SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

No. 413.

ANDERS JAKOBSEN, Claimant of Norwegian Steamship Albert Dumois, Appellant, vs. OSCAR M. SPRINGER et al., Appellees.	No. 272.
OSCAR M. SPRINGER, Appellant, vs. ANDERS JAKOBSEN, Claimant, Appellee.	No. 139.

SUPPLEMENTAL BRIEF OF TIMOTHY E. TARSNEY ON BEHALF OF OSCAR M. SPRINGER, APPELLANT.

On January 28th, A. D. 1897, a collision occurred between the steamer Dumois and the yacht Argo, owned by appellant, which resulted in the sinking of the yacht, and the total loss thereof. On the same day Mr. Springer filed a libel in the District Court of the United States for

the Eastern District of Louisiana against the said steamer Dumois. A warrant was thereupon issued and the vessel seized by the marshal. (R., p. 4.)

January 29, 1897, Isaac Broadhurst and others, composing the crew of the Argo filed an intervening libel against the Dumois, claiming for loss of effects. (R., pp. 5-7.)

February 3d, 1897, a petition was filed by claimant of steamer Dumois for appraisement of vessel and for benefit of the liability act, on the same day order of appraisement was made, and upon giving stipulation for the amount of the appraised value, the vessel was ordered released. (R., p. 11.) The vessel was appraised at the sum of thirty thousand dollars. (R., p. 12.) The stipulation having been given, the vessel was released February 4, 1897. Mr. Springer subsequently took the benefit of the limited liability act and surrendered the wreck of the Argo. (R., pp. 42-3.)

February 3, 1897, Mrs. Marie B. Bourgeois de Blesine, the mother of one of the persons lost in the collision, filed a libel claiming damages alleged to have been sustained by reason of the death of her son, and on May 4th, Mrs. Hester filed her intervening petition, as widow of Harrison P. Hester, the other person lost in the collision.

The libel of Mrs. de Blesine is against Anders Jacobsen, owner of the steamship Dumois (R., p. 13), and prays that a warrant may issue for the arrest of said Jacobsen and an attachment of his goods and chattels for want of personal service. (R., p. 15.) This libel appears to be *in personam* against the owner and does not seek to enforce a claim against the offending res.

The petition of Mrs. Hester (R., p. 30) is an intervening petition, recites the giving of the stipulation by the owners of the steamship Dumois, and prays a decree against the sureties on the bond of the steamship Dumois.

If Mrs. de Blesine and Mrs. Hester have a claim which they could assert as against the offending vessel, it must be by virtue of the local statutes of the state of Louisiana, for they have no claim which they can assert by virtue of the general admiralty law.

This court held in Harrisburg vs. Richards, 119 U. S., 199, that "death on the high seas or waters navigable from the high seas caused by negligence, does not create a cause of action in admiralty unless given by an act of Congress or a state statute."

In this case Mr. Chief Justice Waite reviewed the decisions upon this subject, and while before that time there had been a conflict in the decisions of the courts, this case settled the question that under the general admiralty law there was no lien arising from death caused by negligence.

We must then look to the local laws of Louisiana to ascertain whether any cause of action there arises.

Article 2315, Revised Code of Louisiana, reads, "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The right of this action shall survive in case of death in favor of the minor children and widow of a deceased, or either of them, and in default of this, in favor of the surviving father and mother, or either of them for the space of one year from the death."

A cause of action no doubt survives under this statute in favor of the persons therein named and against the person offending; but it does not follow that because the cause of action survives and an action in personam may be brought against the offending owner, that thereby a lien is created against the offending thing. No doubt either of these parties, other conditions existing, might bring a personal action in the courts of Louisiana against the owners of the Dumois, for that is an entirely different action from a proceeding in rem against the vessel, or the bond which represents the vessel.

Indeed, this court in Barton vs. Brown (The Corsair), 145 U. S., 335, in an opinion by Mr. Justice Brown, in discussing the Louisiana statute, said:

"A maritime lien is said by writers upon maritime law to be the foundation of every proceeding in rem in the admiralty. In much the larger class of cases the lien is given by the general admiralty law, but in other instances, such, for example, as insurance, pilotage, wharfage and materials furnished in the home port of the vessel, the lien is given, if at all, by the local law. As we are to look, then, to the local law in this instance for the right to take cognizance of this class of cases, we are bound to inquire whether the local law gives a lien upon the offending thing. If it merely gives a right of action in personam for a cause of action of a maritime nature, the District Court may administer the law by proceeding in personam, as was done with a claim for half pilotage dues under the laws of New York, in the case of Ex Parte McNeil, 80 U. S., 13 Wall., 237, but unless a lien be given by the local law there is no lien to enforce by proceedings in rem in the Court of Admiralty.

"The Louisiana act declares, in substance, that the right of action for every act of negligence, which causes damage to another, shall survive, in case of death, in favor of the minor children or widow of the deceased; and in default of these, in favor of the surviving father and mother, and that such survivors may also recover the damages sustained by them by the death of the parent, child, husband or wife. Evidently nothing more is here contemplated than an ordinary action according to the course of law as it is administered in Louisiana. There is no intimation of a lien or privilege upon the offending thing which, as we have already held, is necessary to give a court of admiralty jurisdiction to proceed in rem."

The foregoing authorities would seem to dispose of the claims of Mrs. de Blesine and Mrs. Hester.

II.

The decree of the District Court awarded Mr. Springer the sum of $11,000, Mrs. de Blesine the sum of $2,500, Mrs. Hester the sum of $3,000, and various smaller amounts were awarded to different members of the crew.

The Circuit Court of Appeals reversed the decree of the court below, found both vessels at fault and divided the damages, and in addition thereto directed that one-half of the awards of Mrs. de Blesine and Mrs. Hester be deducted from the one-half damages awarded to Mr. Springer. This, we submit, is manifest error. The owners of both steamers having brought themselves within the limitations of the liability act, no sum could be awarded beyond the value of the vessel in the condition she might be in *after* the collision.

In Place vs. Norwich Transportation Company, 118 U. S., 468, this court said:

"The next question to be considered is: At what time ought the value of the vessel and her pending freight to be taken, in fixing the amount of her owner's liability? Ought it to be taken as it was immediately before the collision or afterwards? And if afterwards, at what time afterwards? The first question has been repeatedly answered by the decisions of this court. We held in Norwich Co. vs. Wright, and have held and decided in many cases since, that the act of Congress adopted the rule of the maritime law as contradistinguished from that of the English law on the subject; and that the value of the vessel and freight after, and not before, is to be taken. * * In the case of The Scotland, 105 U. S., 24, the collision occurred opposite Fire Island Light, and the steamer, being much injured, put back, in order, if possible, to return to

New York, but was unable to get further than the middle ground outside and south of Sandy Hook, where she sank, and nothing was saved but a few strippings, taken from her before she went down. We held that these strippings were all of the ship that could be valued, although she had run thirty or forty miles after the collision. The value was taken, not as it was, or as it might have been supposed to be, immediately after the collision, but as it was after the effects of the collision were fully developed in the sinking of the ship."

This rule was followed in The Great Western, 118 U. S., 520.

The Argo having become a total loss immediately upon the occurring of the collision, the liability of the owner having been limited, nothing, of course, could be recovered either from the Argo or from the owner thereof.

After the filing of the stipulation by the owner of the Dumois, the only thing against which creditors of the vessel could proceed was the stipulation filed by the owners upon the release of the vessel, which became a substitute for the released vessel and the rights and remedies of all parties interested in such vessel remained unaffected; but the substitution of the bond and such stipulation are to be regarded precisely the same as though the vessel itself were still in the custody of the court as the actual res to be subjected to its decree. The Wanata, 95 U. S., 611; U. S. vs. Ames, 99 U. S., 42.

After the filing of such stipulation there was the substitute in the custody of the court amounting to the sum of $30,000 which constituted a fund to which all creditors could look for satisfaction, and the only fund from which redress could be sought. Mr. Springer, as the owner of the Argo, and the intervening libelants were all, then, independently of one another, looking to that fund and the recovery of each would be in no wise affected by the recov-

ery of the others, except in the event of the aggregate recovery of all exceeding the penalty of such stipulation, in which event, if the claims were all of the same class, a pro rata deduction would be made.

Even if this were a case where a division of damages would be proper as between the owners of the colliding vessels, I am utterly at a loss to comprehend upon what principle or under what rule a deduction should be made from the amount recovered by the owner of the Argo and applied upon the claims of the intervening libelants. If both vessels had been saved and both had been joined in the libels of the intervenors and both had been found in fault the decree might have been satisfied out of either, and there would have been no contribution, for the law does not recognize the principle of contribution among tort feasors.

As was said by Mr. Justice Brown, in Barton vs. Brown, supra, in speaking of the rules of practice adopted by this court:

"These rules, from 12 to 20 inclusive, were intended to prescribe a remedy appropriate to each class of cases in admiralty, allowing in certain cases a joinder of ship and freight, or ship and master, or alternative actions against the ship, master, or owner alone. In no case, however, under these rules, except in possessory suits, can the ship and owner be joined in the same libel, though perhaps they may be in cases not falling within the rules. * * *

In Newell vs. Norton, 70 U. S., 257, the District Court in accordance with the prayer of the libel, issued process in rem against the vessel for a collision, and citations in personam, against the master, owner and pilot. On exceptions being filed for misjoinder, the court ruled that an action against the owner and pilot could not be joined with the proceeding in rem, and that the libelant must elect which remedy he would pursue; and, he having

elected to proceed in rem against the steamboat and in personam against the master, the libel was dismissed as to the owners and pilot, and sustained as against the steamboat and master. The allowance of this amendment was held by this court to be proper, Judge Grier observing, however, that the objection that a libel in rem against a vessel and in personam against the owner cannot be joined was properly overruled. The word "owner" here is evidently a mistake for 'master,' as appears from the syllabus and statement of the case."

The intervening libel of Mrs. de Blesine being properly in personam, and having no reference either to the vessel or stipulation, cannot be treated as a claim against the vessel or against the principal or sureties in such stipulation. In other words, if she has a remedy at all, it is a remedy entirely outside of the subject matter involved in this suit as the fund from which claimants can obtain satisfaction.

III.

As to the claim of the seamen a different rule obtains.

In The Niagara, 77 Fed. Rep., 329, Judge Brown lays down the rule, "As respects the personal effects of the master, officers and crew, the rule followed in this court has been that the ship's company are identified in interest with their own ship as respects any damages arising from faults in navigation which is their common duty and employment and that they therefore recover half damages from the other ship in case of mutual fault. Citing The Queen, 40 Fed. Rep., 694; Killien vs. Hyde, 63 Fed. Rep., 172; The A. Heaton, 43 Fed. Rep., 592; Quebec Steamship Co. vs. Merchant, 133 U. S., 378; Hedley vs. Steamship Co., 1 Q. B., 58.

(V.)

My brother, De Gray, has very clearly demonstrated in his admirable brief that the rules adopted by the Board of Supervising Inspectors do not apply in this case, but that the collision occurred at the point where the United States Statutes or the International Code of Rules govern the conduct of vessels. And it seems clear that Rule 18, Section 4233 of the Revised Statutes governs this case: "If two vessels under steam are meeting end-on, or nearly end-on, so as to involve risk of a collision, the helms of both shall be put to port, so that each may pass on the port side of the other."

The rule is well settled that steamers approaching each other from opposite directions are respectively bound to port their helms, and pass each other on the larboard side.

N. Y. & B. Trans. Co. vs. Phila. & S. S. Nav. Co., 22 Howard, 461.
The Niagara, 3 Blatchf., 37.
Williamson vs. Barrett, 4 McLain, 589.
Williamson vs. Barrett, 13 How., 100.

This rule must be acted on when there is any probable chance of a collision by the two steamers keeping their courses. It is not enough for the party who departs from this rule to show that they would have gone clear if each had kept its course. He must also show that the other party ought to have perceived there was no probable chance of a collision by so doing

Wheeler vs. The Eastern, 2 Curt. C. C., 141.

Where one of two approaching steamers observes the rule that he is to port helm, the burden lies on the other that departed from the rule to make out a justification.

The Washington, 3 Blachf., 276.

If the collision occurs from such other vessel not having kept her course, the obligation rests on the latter to show sufficient excuse in the particular case for the departure from the rule.

The Corsica, 9 Wall., 630.
The Chesepeake, 5 Blatchf., 411.

Where to avoid a collision between two vessels propelled by steam, one going with and the other against the tide, and it is conceded that one should stop, it is the duty of the vessel proceeding against the tide to do so, as her movements can be controlled with less difficulty than those of the other vessel.

Galatea, 92 U. S., 439.

A steamer which is bound to keep out of the way of another approaching so as to involve a risk of collision, has no right to attempt to pass to the left, unless there is an imperative necessity for it.

Studwell vs. The E. H. Coffin, 16 Blachf., 421;
Fed. Case No. 4310; 8 Reporter, 297.

ARGO CASE.

Evidence of all the witnesses for both sides tends to show the time intervening between the faulty starboard helm of the Dumois and the collision was very short.

On this point Lombard saw the lights of the Argo (red, green and white) about the same time he saw all the lights *together* of the luggers. He did not hear the Argo blow, but blew two whistles because, as he said, "I was out." (Record, page 241.) Out where if not out in the stream? After he hauled out they (the lights) appeared a little inside, and then he said, "When I first sighted them they were dead ahead." (Record, page 241.)

At page 242 he says, "I blew two whistles," the Argo answered me with one. I then blew two again to let them know that we had star-boarded our helm, immediately followed them up with a danger signal, and immediately stopped and backed my steamer.

Q. What interval was there between the repetition of these two signals?

A. It could not have been five seconds.

Q. You answered the Argo's whistles immediately?

A. Yes, sir, with two and a danger signal.

Q. What interval was there between that and the backing of the Dumois?

A. Just about two seconds. (Record, page 243.)

Q. Did you have any means of forming an opinion as to the length of time which elapsed between the blowing of your first signal and the collision?

A. Not very well, Mr. Grant.

Q. Was it a short time or a long time?

A. It was not a very long time, but there was plenty of time enough to have avoided the collision if the Argo had stopped.

Q. Could you have gotten any closer to the east bank than you were at the time you discovered the lights of the Argo?

A. Not much, no sir. (Record, page 246.)

Q. Did you observe how near the Argo was when she changed her course after the signals were given?

A. She could not have been more than two ship lengths away from us. (Record, page 247.)

Q. You saw the Argo's lights, as I understand you say, brightly?

A. I saw the lights, yes, sir.

Q. When you swung off from the east bank what were you swinging off for?

A. To clear the lights ahead of me.

Q. And how close were you to those lights when you saw them?

A. I must have been a quarter of a mile, a little more.

Q. Who saw the lights first?

A. I suppose I did; I always saw everything ahead; pretty near right ahead of there.

Q. No, I don't ask for any suppositions. I ask you whether your lookout saw them first, or you saw them first, or who saw them first?

A. I guess I saw them first.

Q. Did you see them first or were they reported to you?

A. I saw them first and they were also reported to me.

Q. Afterwards?

A. Yes, sir, afterwards.

Q. Then you were about a quarter of a mile off?

A. Yes, sir. (Record, pages 255 and 256.)

Q. What speed was the Dumois coming up the river when you discovered the lights of the Argo?

A. She must have been coming up about nine knots.

No one pretends to say the Argo changed her course until the Dumois had blown the first cross signal, and then Lombard said the Argo was not "more than two ships lengths away from us." Neither he or his lookout saw the Argo's lights, or the lights of the luggers, notwithstanding all were burning brightly until they were within "a quarter of a mile, a little more," and why did he not see them before? He might have gone closer to the bank with Dumois, but "not much, although he gave the Argo two whistles and starboarded because he says, "I was out." Out where, if not out in the stream? The speed of the Dumois was nine knots, that of the Argo eighteen and hence the vessels, if only "a quarter of a mile, a little more," apart when Lombard first saw the lights, would meet in from 33 to 35 seconds.

Sibitsen testified, the danger signals were blown at once after the two whistles and the engines were stopped and reversed. (Rec., p. 271.) Yet the Dumois had not lost her headway at the time of the collision (Rec., p. 272), and passed the Argo three or four ships' lengths, 600 feet and more, if three ships' lengths, and eight hundred feet and more if four ships' lengths. (Rec., p. 270.) In other words, the Dumois immediately after the cross signal, reversed and backed, yet she continued on her way against the current of the river, from two to three hundred yards, after the collision. If this does not indicate the vessels were only, as Lombard said, a "couple of ships' lengths away from" each other when the Dumois went on a starboard helm, and put the Argo in extreme danger, what does it indicate? If they were so close together, the time of danger of collision until the collision was very short, and would not exceed Captain Brown's estimate of the time. After the collision the Dumois went up stream so far that Sabitsen could not hear, nor does it appear anyone on the Dumois heard the crew of the Argo calling for assistance, which shows the vessels were close together when the Dumois went on a starboard helm and crossed the bows of the Argo, for if the Dumois were any considerable distance away when she starboarded and reversed, her headway would have been checked, which does not appear to have been the case. Brown says it was not over 15 seconds from the starboard helm of the Dumois until the collision. (Rec., p. 50.)

Desemes, says from the time the red light of the Dumois was shut out, and the green light appeared until the collision, not over four seconds elapsed—he only had time to *run* from the bridge of the after end of the cabin. (Rec., p. 81.)

Green came out as soon as the signals had been crossed by the Dumois, and saw "a collision was inevitable." (Rec., p. 96.)

He went aft immediately and only got to the cabin door when the shock occurred. (Rec., p. 98.) The Dumois went by like a railroad train—"She was going very fast after the collision. (Rec., p. 99.)

This evidence establishes the fact that the Dumois must have been close to the Argo when the signals were crossed and when she starboarded her helm to cross the course of the Argo, otherwise the headway of the Dumois would have been checked and she would not have gone away and disappeared in the darkness. (Rec., p. 99.)

Another thing that seems apparent is that the Dumois did not stop her engines and back, as soon as the cross or danger signals were given. If she had, her headway would have been checked, if not entirely stopped. If the Argo and the Dumois were two ships' lengths of the Dumois apart, as Lombard says, when the Argo changed her course (Rec., p. 247), the Dumois, going against the current, could have stopped, and had she done so no collision would have occurred.

Notice also that Lombard says he thought it necessary to go out to avoid the luggers tied up at the shore, while Sibitsen says they swung out for the Argo, and that they did not have to swing out to pass the luggers. (Rec., p. 273.)

It was clearly then the duty of the Dumois, as well as of the Argo, to have kept on her course, unless they were meeting end-on so as to involve risk of collision, within the meaning of Rule 18, in which event both should have put their helm to port, so that each might pass on the port side of the other. It is quite evident from the facts in this case, that if the Dumois had held her course or had put her helm slightly to port, there would have been no risk of a collision, especially in view of the fact that the Argo did port her helm and change her course to starboard. So that the divergence would have been suf-

ficient to have avoided contact. The Dumois, in crossing the signals and putting her helm to ~~port~~ starboard and seeking to cross the bows of the Argo, committed an unpardonable fault, and unless in the trying and perilous position in which she thus placed the Argo the master of the Argo did some act, or omitted to do something, which he ought not to have done which contributed to this collision, the sole fault rests with the Dumois. Surely Captain Brown, in obeying the mandate of the 18th Rule in putting his helm to port, did not commit a fault. No man can be in the wrong for obeying the law. Captain Brown had a right to asume, that though the Dumois committed the error of ~~porting~~ starboarding her helm, that the error would be at once corrected and she put upon her course up the river. He had no reason nor right to assume that the error committed would be persisted in, and we think it would have been a grievous error upon Captain Brown's part to have put his wheel to starboard and endeavored to make a starboard passage, for, had he done so, and the Dumois had corrected the error she had made, a collision would have been the inevitable result.

As was said in Hutchinson vs. The Northfield, 154 U. S., 629 (24—680): The officers of the tug also perfectly understood that under the 18th of the same rule it was their duty to keep the tug on its course. The officers of each vessel had a right to assume that the officers of the other vessel would do their duty, and to make their course and *keep their speed* upon that assumption."

Again, in The Brittania, 153 U. S., 130, the Court follows the above rule, and cites with approval The Elizabeth Jones, 112 U. S., 352, where it was said: "Conceding it to have been the duty of the Willis under the rule to keep out of the way of the Jones, it was clearly the duty of the latter not to baffle or prevent the efforts of the Willis to that end. Her departure from the rule, that

she should keep her course, cannot be justified, because there were no special circumstances for such departure necessary in order to avoid immediate danger." In Belden vs. Chase, 150 U. S., 699, it was said: "It is a settled rule in this Court, that when a vessel has committed a positive breach of the statute, she must show not only that probably her fault did not contribute to the disaster, but that it would not have done so. Obedience to the rule is not a fault, even if a different course would have prevented the collision. * * * Masters are bound to obey the rules, and entitled to rely upon the assumption that they will be obeyed, and should not be encouraged to treat the exception as subject to solicitude rather than the rules."

Again, In The Deleware, 161 U. S., 467, the Court said: "The cases of the Brittania, and Hutchinson vs. The Northfield, must be regarded as settling the law, that the preferred steamer will not be held in fault for maintaining her course *and speed*, so long as it is possible for the other to avoid her by porting, at least, in the absence of some distinct indication that she is about to fail in her duty. If the master of the preferred steamer were at liberty to speculate upon the possibility or even the probability of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not and produce a timid and feeble action on the part of both, which would bring about more collisions than it would prevent.

Belden vs. Chase, 150 U. S., 674;
The Highgate, 62 L. T., 841.

It is, however, contended by counsel that the Argo was at fault in not reversing her engines and stopping. But it

was held in The Free State, 10 Otto, 200, that "If two steamers are meeting each other end-on, or nearly so where there is plenty of sea-room, and at a considerable distance from each other, it is not the duty of either to stop, reverse or slacken. The duty of each is to pass on the port side; and the rate of speed is not an element in the case. The risk of collision is not present under such circumstances."

In the case of the Scotia, 14 Wall., 170, the Court say: "This duty of the steamer to keep out of the way, implies a correlative obligation of the ship to keep her course, and to do nothing to mislead; nor is the steamer called on to act except where she is approaching a vessel in such a direction as to involve a risk of collision. She is required to take no precautions when there is no apparent danger. Was the Scotia then in fault? We have already said that she was not bound to take any steps to avoid a collision until danger of a collision should have been apparent; and we think there was no reason for apprehension until the ship's light was seen closing in upon her. * * * It is not the law, that the steamer must change her course, or must slacken her speed the instant she comes in sight of another vessel, no matter in what direction it may be. See also, The Jesmond vs. Earl of Elgin, L. R. 4, P. C. 1; The Potomac, 13 Howard, 101."

Again, in the Northfield, supra, the Court said: "The officers of each vessel had the right to assume that the other vessel would do its duty, and to make their course *and keep their speed* upon that assumption."

This rule was approved in The Brittania, where it was held that "Where two steamers are crossing so as to involve risk of a collision, the one whose duty it is to keep her course must not interfere with or thwart the movements of the other vessel by stopping her headway, unless some exigency of obvious danger justifies her stopping."

Mr. Justice Brown stated in the case of The Delaware, 161 U. S., 459, after saying that some of the authorities go so far as to hold it the duty of the preferred steamer to stop and reverse, when a continuance of her course involves an apparent danger of collision, and that other authorities hold that the master of the preferred steamer ought not to be embarrassed by doubts as to his duty, and unless the two vessels be in extremis he is bound to hold his course and speed, says: "The cases of the Brittania and the Northfield must be regarded, however, as settling the law, that the preferred steamer will not be held in fault for maintaining her course *and speed* so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty."

Applying these well-settled rules to the case at bar, it is difficult to say where any fault can be attributed to Captain Brown. He was placed in this trying position solely through the initial fault of the Dumois in porting her helm and seeking to cross his bows. The law directed Captain Brown to port his helm. This he did. He had a right to assume, as before stated, that the Dumois would correct her error and straighten in her course, and thus allow the Argo to pass to port or to westward. He was placed in a position of extreme peril through no fault of his own, and no doubt did that which appeared to him at the time to be the safer and more proper course to take, and one which was strictly in accord with the rules of navigation. Relying upon the speed of his vessel and possibly hoping for a correction of the error on the part of the Dumois, he ported his helm and went on his course. That he miscalculated the action of the Dumois is evident. He is not held to that course of conduct which we might contemplate, viewing the transaction from our present standpoint and deliberating upon what might have been; but he is to be held by the cir-

cumstances and conditions as they appeared to him at the time he acted. And so long as he violated no law or rule of navigation he cannot be said to be in fault for not doing that which *might* by some possibility have avoided the collision.

In the act to adopt Regulations Preventing Collisions at Sea, approved August 19th, 1890, 26 Statutes at Large, 320, the following rules were enacted:

Art. 18. When two steam-vessels are meeting end-on, or nearly end-on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

This article only applies to cases where vessels are meeting end-on, or nearly end-on, in such a manner as to involve risk of collision, and does not apply to two vessels which must, if both keep on their respective courses, pass clear of each other.

The only cases to which it does apply are when each of the two vessels is end-on, or nearly end-on, to the other; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own; and, by night, to cases in which each vessel is in such a position as to see both the side lights of the other.

It does not apply by day to cases in which a vessel sees another ahead crossing her own course; or, by night, to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

"Art. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

Art. 20. When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

Art. 21. Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course *and speed.*"

These rules, I take it, were adopted by Congress for the purpose of enacting into positive law those methods of procedure which had already become established and received a practical construction by mariners of the previous rules. And it will be noted that Article 21 expressly provides, "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and *speed.*

I submit that the decree below should be reversed, and a decree directed in favor of Mr. Springer against the Dumois for the full amount of damages sustained by the collision, without the deduction therefrom of any claim of the intervening libelants.

Respectfully submitted,

TIMOTHY E. TARSNEY,
Of Counsel.

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No. 139.

OSCAR M. SPRINGER, LIBELLANT, PETITIONER,

versus

ANDERS JAKOBSEN, CLAIMANT, ETC.

No. 272.

ANDERS JAKOBSEN, CLAIMANT, ETC.,

versus

OSCAR M. SPRINGER, RESPONDENT.

SUPPLEMENTAL BRIEF OF SPRINGER ON PILOT RULES AND REGULATIONS.

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Supreme Court of the United States

OCTOBER TERM, 1899.

No. 139.

OSCAR M. SPRINGER, LIBELLANT, PETITIONER,

versus

ANDERS JAKOBSEN, CLAIMANT, ETC.

No. 272.

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OSCAR M. SPRINGER, RESPONDENT.

SUPPLEMENTAL BRIEF OF SPRINGER ON PILOT RULES AND REGULATIONS.

After the facts in this case are determined, it is necessary in the discussion of the matter of fault to ascertain what pilot rules and regulations of the supervising inspectors cover the waters where this collision occurred. We have discussed both in our original brief—the former fully, and do not care to enter upon that matter again as we are satisfied with what we have already

said upon that subject, but will make brief reply to the Supplemental brief of the Dumois on the matter of what pilot rules and inspectors' regulations were controlling when this collision occurred.

The collision having taken place on January 28th, 1897, the law then in force was the Act of Congress approved February 19, 1895, Chap. 102, 28 Stat., p. 672, whose title declares it to be:

"An Act to adopt special rules for the navigation of harbors, rivers and inland navigation of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal, supplementary to the Act of August 19, 1890, entitled 'An Act to adopt regulations for preventing collisions at sea.'"

This Act declared: that on and after March 1, 1895, the provisions of sections 4233, 4412, and 4413 of the Revised Statutes and regulations pursuant thereto should be followed on the harbors, rivers and inland waters of the United States, and the provisions of said sections of said Revised Statutes and regulations pursuant thereto, are, by said Act, declared special rules duly made by local authority relative to the navigation of harbors, rivers and inland waters as provided for in Article 30 of the Act of August 19, 1890, entitled "An Act to adopt regulations for preventing collisions at sea."

Section 4233, above referred to, contains 24 different rules, which relate to "Lights", "Fog Signals" and "Steering and Sailing Rules",—the latter from Nos. 16 to 24, both inclusive—and said latter are the only ones necessary to observe in this case. They are very plain, and are to be followed on all the harbors, rivers and inland waters of the United States, except the Great Lakes, but the regulations of the Board of Inspectors are not so plain, nor are the precise waters which they are to cover always defined. They are to be found on various pages of the Regulations of January, 1896, to-wit, pages 73 to 82; 82 to 86, and 86 to 95. Which of the various rules relate to par-

ticular localities, cannot always be determined by reading the rules themselves, but only by reading the heading of each set of rules and regulations. On page 73 are found "PILOT RULES FOR ATLANTIC AND PACIFIC INLAND WATERS", on page 82 "PILOT RULES FOR WESTERN RIVERS", and on page 86 "PILOT RULES FOR THE GREAT LAKES AND THEIR CONNECTING AND CONTRIBUTORY WATERS AS FAR EAST AS MONTREAL". Now from the heading or caption of the "PILOT RULES FOR WESTERN RIVERS" as well as from reading some of the rules that follow one would be led to conclude they were regulations that were to control the Mississippi river from its highest navigation to the Gulf of Mexico, but upon reading the last of these rules—Rule XIV.—we are clearly told the pilot rules for Western Rivers end at the lower limits of the city of New Orleans, and we are not here told what, or that any pilot rules control the river below the lower line of the limits of the city of New Orleans. And to make it appear that there are such rules for said lower river we would have to insert in said Rule XIV. after the word "and" and before the word "harbors" the words "and the pilot rules on", making said Rule XIV read, "The line dividing jurisdiction between the pilot rules of western rivers and 'the pilot rules on' harbors, rivers and inland waters at New Orleans, shall be the lower limits of the city", and would have to obliterate from the caption of the "Pilot Rules for Atlantic and Pacific Inland Waters", the language therein contained excluding from their operation the rivers emptying into the Gulf of Mexico. But here there is no reference whatever to any pilot rules or regulations covering the river below the lower limits of the city of New Orleans.

What regulations, or that there are any regulations beyond the sections of the Revised Statutes that control the Mississippi river below the lower limits of the city of New Orleans does not here appear. There may be an inference that there ought to be such regulations somewhere, but there are none, because their

jurisdiction terminates at the lower limits of said city, and when we go back to "PILOT RULES FOR ATLANTIC AND PACIFIC COAST INLAND WATERS" we gain no information or direction on this subject nor do we find any regulation covering the Mississippi river from the lower limits of the city to the sea, because the "rivers emptying into the Gulf of Mexico" (and the Mississippi river more than any other, is one so emptying) are expressly excepted from the operation from said Atlantic and Pacific rules in the following and unmistakable words:

"*Rules and regulations for the government of pilots of steamers navigating harbors, rivers, and inland waters (except the Great Lakes, the Red River of the North, and rivers emptying into the Gulf of Mexico, and their tributaries) when meeting or approaching each other, whether by day or night, and as soon as fully within sound of the steam whistle. (Adopted by the Board of Supervising Inspectors, June, 1871; amended January, 1875, 1881, 1882, 1893, 1895.)*"

It is true it is contended that this heading or caption to which we are bound to resort to ascertain where said rules are to be applied is negatived—wiped out, declared nugatory, by the three closing lines of Rule IX of said Atlantic and Pacific rules, which are in the same language as Rule XIV of the Pilot Rules for Western Waters, to-wit:

"The line dividing jurisdiction between pilot rules on Western rivers and harbors, rivers and inland waters at New Orleans, shall be the lower limits of the city."

But what is there, where is there, anything to show what rules are to control on the Mississippi river below the lower limits of the city and the sea? Certainly nothing, and the result—the clear result—is, that this part of the river is controlled solely, by section 4233 of the Revised Statutes and the steering and sailing rules therein provided.

It is clear, if the Mississippi river above the line of the lower limits of the city is controlled by Pilot Rules for Western Rivers, said rules would so say, and in fact do so say, and if said

river from said lower limits of said city to the Gulf were to be governed by the said Atlantic and Pacific rules, the latter part of Rule IX of said rules would have so declared, but in the absence of such declaration, either in the Atlantic and Pacific Rules, or in The Rules for Western Rivers, and in the teeth of the express exception in the caption of the former rules excluding all rivers emptying into the Gulf of Mexico, it is very clear that no regulations, beyond the section of the statute itself have been provided for the river below the lower limits of the city of New Orleans. In other words, the sum and substance of said Rule XIV and Rule IX is, that the Western Rules terminate at the lower limits of New Orleans, nothing more or less. There is no designation by either set of "Rules" of any line dividing the jurisdiction between two different sets of polit rules, as is contended, but only a designation of a line dividing the jurisdiction of the pilot rules of the "Western Rivers" from the "harbors, rivers and inland waters" below the lower limits of the city of New Orleans, that is from the waters of said "harbors, rivers and inland waters". In short, the designated line is the lower limit of the pilot rules of the Western Rivers and the beginning of "harbors, rivers and inland waters" below New Orleans, and not the beginning of any pilot rules for such waters.

The assertion that the Supervising Inspectors never intended to exempt from their jurisdiction the waters stretching from the Gulf of Mexico to the city of New Orleans is of no force, for the inquiry here is, not what they intended, but whether or not they have provided any regulations covering these waters. They undoubtedly had the right,—they had the jurisdiction to provide regulations for these waters, but it is very clear they have not attempted to exercise such right.

Nor does the action of the Secretary of the Treasury in defining the line dividing the river, harbors and inland waters of the Mississippi river from the sea, settle the question as to

whether the Rules of the Atlantic and Pacific inland waters have any force between the lower limits of New Orleans and the sea, because it merely settles one thing, to-wit: it defines the line which divides the high sea from rivers, harbors and inland waters, and nothing more. It is true, that under the terms of the statute, the rivers, harbors and inland waters being above the line dividing them from the high seas, are to be subject to Sections 4233, 4412 and 4413 and the regulations pusuant thereto, but the question here is, are there, any regulations of the Supervising Inspectors pursuant to said sections of said Revised Statutes covering the portion of the river in question? Surely not. For as we have already shown, said Inspectors have never attempted to do more than to define the line, or point, where the Pilot Rules of Western Rivers end, and where the waters of "harbors, rivers and inland waters" begin, either by Rule XIV of said Western Waters or by the last paragraph of Rule IX of said Atlantic and Pacific Rules, for the language of each is the same.

The preamble or caption of the Atlantic and Pacific Rules is not in conflict with the latter part of said Rule IX, because the latter does not directly or by implication propose to enlarge or extend the operation of said rules for the "rivers, harbors and inland waters" of the Mississippi river, but only defines the boundary line between the pilot rules of the Western Waters and the "rivers, harbors and inland waters" at New Orleans, without saying what or that any Inspectors' regulations are to control said river, harbor or inland waters below the limits of New Orleans to the high seas.

The result is, that there were no pilot rules covering the waters of the Mississippi river, "at the time of this collision," below New Orleans, except those provided in section 4233 of the Revised Statutes.

Respectfully submitted,

RICHARD DEGRAY.

Proctor for O. W. Springer

APPENDIX.

CHAP. 102—An Act to adopt special rules for the navigation of harbors, rivers and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal, supplementary to the Act of August nineteenth, eighteen hundred and ninety, entitled "An Act to adopt regulations for preventing collisions at sea."

Be it enacted &c., That on and after March first, eighteen hundred and ninety-five, the provisions of sections forty-two hundred and thirty-three, forty-four hundred and twelve, and forty-four hundred and thirteen of the Revised Statutes and regulations pursuant thereto shall be followed on the harbors, rivers and inland waters of the United States.

The provisions of said sections of the Revised Statutes and regulations pursuant thereto are hereby declared special rules duly made by local authority relative to the navigation of harbors, rivers and inland waters as provided for in Article thirty, of the Act of August nineteenth, eighteen hundred and ninety, entitled, "An Act to adopt regulations for preventing collisions at sea."

SEC. 2. The Secretary of the Treasury is hereby authorized, empowered and directed from time to time to designate and define by suitable bearings or ranges with light houses, light vessels, buoys or coast objects, the lines dividing the high seas from rivers, harbors and inland waters.

SEC. 3. Collectors or other chief officers of the customs shall require all sail vessels to be furnished with proper signal lights.

Every such vessel that shall be navigated without complying with the Statutes of the United States, or the regulations that may be lawfully made thereunder, shall be liable to a penalty of two hundred dollars, one-half to go to the informer; for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense.

SEC. 4. The words "inland waters" used in this Act shall not be held to include the Great Lakes and their connecting and tributary waters as far east as Montreal;

and this Act shall not in any respect modify or affect the provisions of the Act entitled "An Act to regulate navigation of the Great Lakes and their connecting and tributary waters," approved February eighth, eighteen hundred and ninety-five. [*February 19, 1895.*]

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1899.

No. ——

ANDERS JAKOBSEN, CLAIMANT OF NORWEGIAN STEAMSHIP ALBERT DUMOIS, *Appellant*,

versus

OSCAR M. SPRINGER ET ALS., *Appellees*.

No. 272.

OSCAR M. SPRINGER, *Appellant*,

versus

ANDERS JAKOBSEN, CLAIMANT, *Appellee*.

No. 139.

BRIEF ON BEHALF OF ANDERS JAKOBSEN, APPELLANT.

STATEMENT.

The collision, which is the ground of action in this case, took place eighty miles below the city of New Orleans, between the Argo, a fast steam yacht, 110 feet long and six feet draught, and the Norwegian steamship Albert

Dumois, a slow freight vessel, 210 feet long and 17 feet draught, engaged in the fruit trade between New Orleans and Port Limon, Costa Rica.

The Argo was chartered by representatives of the *Daily Picayune*, and left this city at 7 o'clock P. M., January 27, 1897, for a trip to the Jetties, having on board James Brown, as master; Robert S. Orkney, engineer; Isaac Broadhurst, fireman; E. C. Green, cook; Charles A. Desseamus, deckhand, and H. P. Hester and Faurie B. de Blesine, reporters for the *Picayune*, who shipped as part of the crew, the yacht being shorthanded.

The Dumois entered the river, on a voyage from Port Limon, Costa Rica, to New Orleans, about 10 o'clock P. M., having on board William M. Lumbard, a licensed pilot; a master and first and second mate, engineers and a full crew.

Both vessels arrived at a point near the New Canal, eighty miles below the city, about 12:30 A. M., the Argo descending near the east bank at a speed of eighteen or twenty miles an hour, and the Dumois ascending, also near the east bank, at a speed of nine miles an hour, and when signals were first exchanged for passing they were about half a mile apart, "head and head," the Argo, however, being a little on the starboard of the Dumois. The night was clear, but dark, and a bitter cold wind was blowing across the river from east to west. The tug Day Dream, with a tow of two or three luggers, at this time was just coming into the landing, about 200 feet below the canal, on the east bank, for the purpose of lying by for the night. The Argo came down very close to the tug and luggers and saluted them with one whistle when just above them and again as she passed them. After the Argo had passed them, and as soon as her lights came in view and could be distinguished, the Dumois gave two blasts of her whistle, indicating that she would starboard and pass the Argo on the right, it being impossible for her

to port her helm without going into the bank, or running into the tug and luggers, just ahead, and unsafe to keep her course in the face of the Argo, which was rapidly approaching, "head and head," without indicating her intention to change her own course. Immediately after the Dumois changed her course, so that her red port light was shut out, the Argo answered her signal with one whistle, and put her helm hard aport, still keeping her speed, Captain Brown, believing, as he says, that his vessel was so fast he could safely cross ahead of the Dumois. Supposing that his first signal had not been heard, or, if heard, had been misunderstood, the pilot of the Dumois immediately repeated his signal, and gave the danger signal of three whistles and reversed and backed; but before her headway could be fully stopped the Argo came in collision, striking the Dumois at right angles about ten feet aft the stem. After the vessels separated the Argo's engines, which had stopped from the shock, were started up and her head pointed to the west bank, with the intention of beaching her, but she sunk in four or five minutes, carrying down Hester and Blesine, who lost their lives, and became herself a total loss.

The appellees, as we understand it, dispute this statement of fact on two material points only, asserting, first, that the Argo was coming down in her proper place in the middle of the river, when the two vessels first exchanged signals, and second, that the Argo blew the first whistle, which the Dumois crossed.

The District Court found, but without giving any opinion, that the Dumois was solely in fault, and awarded $11,000 damages for the loss of the Argo; $5000 to the widow and minor child of Hester; $2500 to the mother of Blesine and $315 for the personal effects of the crew.

The case was taken to the Court of Appeals by the

claimant of the Dumois on the following assignment of errors (Rec., p. 311):

1. That the Court erred in finding the steamship Albert Dumois in fault for the collision, under the evidence, and in awarding damages against her in favor of the libellant and intervenors.

2. The Court erred in not finding that the steam yacht Argo was solely in fault for the collision, and so decreeing.

3. The Court should have found, and the Court erred in not finding, as matter of fact and law from the evidence, that the Argo was in fault for said collision, in the following particulars:

(*A*) In being so constructed as to be incapable of reversing her engines, backing and stopping, when it might become necessary for her to do so under the rules of navigation.

(*B*) In being insufficiently officered and manned, and not keeping a proper lookout.

(*C*) In being out of her proper place in the river and invading the course of the Dumois, which was ascending on the east bank, and in running at an excessive, dangerous and reckless speed at and before the time of collision, and in not attempting to stop to prevent a collision.

(*D*) In not recognizing the right of the Dumois to starboard her helm at the time she did, for the purpose of clearing the tug Day Dream and luggers, lying on the east bank of the river, directly ahead, and governing herself accordingly.

(*E*) In neglecting to comply with her own signals, when she first gave one blast of her whistle, and afterward tardily porting and attempting to cross ahead of the Dumois, thereby directly causing the collision, when she might have avoided it by stopping, by keeping her course, or by starboarding her helm.

4. The Court erred in not finding as matter of fact and law, from all the evidence, that the Dumois was ascending

the river in her proper course near the east bank, and that the Argo was descending the river out of her proper place, head on, or nearly so, to the Dumois, when the two vessels first exchanged signals for passing.

5. The Court erred in finding the Dumois in fault in starboarding her helm at the time she did, for the purpose of clearing the said tug and luggers, then lying on the east bank of the river, ahead of her.

6. The Court erred in finding that the Dumois was in fault in not porting her helm to pass the Argo.

7. The damages awarded against the Dumois are excessive, and exceed the losses suffered by the libellant and intervenors by one-half, whether the Dumois was wholly or only partly in fault (Rec., p. 311).

Oscar M. Springer filed a cross appeal, alleging as sole error that the District Court should have awarded $15,000 as the value of the Argo, with interest from January 28, 1897 (Rec., p. 317), instead of $11,000.

The Court of Appeals reversed the degree of the District Court, increased the value of the Argo from $11,000 to $15,000 dollars, found both vessels in fault, and divided the damages (Rec., p. 331).

The case comes to this Court on writs of certiorari sued out by both Springer and Jakobson, and, under the order of this Court, entered when the writ was allowed on the petition of Jakobson, his appeal is to be heard with that of Springer upon the same record.

We complain that the Circuit Court of Appeals erred in the following particulars:

1. In not finding that said collision was caused solely by the fault of the yacht Argo, as established by the evidence; and in not discharging the steamship Albert Dumois from all liability for such collision;

2. In not holding that Blesine and Hester, under the uncontradicted evidence, were members of the crew of the

yacht Argo at the time they were killed, and as such partook of the fault of their vessel;

3. In fixing the value of the yacht Argo at $15,000, when the fact is she was not worth more than $9000 at the time of her loss.

Oscar M. Springer complains that the Court of Appeals erred: (1) Because it holds the Argo mutually in fault with the Dumois in causing said collision; (2) Because it found that the claimant of the Dumois is entitled to deduct one-half of what he is adjudged to pay Mrs. Hester and Mrs. Blesine from the half damages first decreed to him as the half value of the Argo; (3) Because said decree does not increase the value of the Argo to at least $20,000; (4) In case the above should be found untenable, then he complains that there was nothing for said Court of Appeals to base its decree upon, as there were no facts found by the District Court.

As the appeal of Jakobsen is to be heard with that of Springer, the paging noted in this brief may be taken to refer to the record printed in the appeal of the latter.

II.

The Pleadings.

The steamship Dumois was seized under a warrant issued on the libel of Oscar M. Springer, the alleged owner of the Argo (Rec., p. 1). After answering to the libel, Anders Jakobsen, claimant and owner of the Dumois, filed a petition in the cause (afterward amended, Rec., p. 25), claiming the benefit of Secs. 4283, 4284, 4285 of the United States Revised Statutes, limiting the liability of vessel owners in cases of collision to the value of the vessel and pending freight. The Dumois and pending freight were valued at $31,133.73, and the vessel was released pursuant to law on a bond for this amount.

The petition as amended (Rec., p. 25) avers that on the

night of January 27, 1897, the Dumois was proceeding up the river, close to the east bank, at the moderate speed of nine miles an hour, when at a point about eighty miles below the city, her lookout, pilot and mate discovered the lights of a steamer coming down, also close to the east bank, "head and head," but somewhat on the starboard of the Dumois; that immediately upon discovering the lights of the steamer (which subsequently proved to be the Argo), and before any signal had been given by the Argo, the Dumois gave two clear and distinct blasts of her steam whistle, indicating that she would pass the Argo starboard to starboard; that the Argo answered with one whistle, crossing her signal; that fearing his first signal had not been heard, or if heard had been misunderstood, the pilot of the Dumois immediately repeated the signal, and at once gave the danger signal and reversed her engines and backed; that the Argo, in disregard of her duty, neglected to stop her engine and back, and kept her speed and course, until her pilot saw the green, or starboard light of the Dumois, when he attempted to pass ahead of her, by putting his helm hard aport, which brought the Argo in collision with the steamship, striking her ten feet aft of the stem, from which collision the Argo sank and became a total loss.

The petition further alleges that the Argo carried no masthead light, but that the two colored lights were placed on each side of the pilot-house, and the white light forward, on the same level, and but a few feet above the water, which arrangement was unusual, and gave the lights the appearance of being farther off than they really were; that owing to this position of the lights, the Argo was not visible until she had cleared the Day Dream and luggers, which were coming to a landing on the east bank, about half a mile distant above, and that the steamship, at the time she first signaled, was compelled to pull out from the bank to clear them, as she could not safely go between

them and the bank, or go closer to the bank, which the pilot of the Argo must have known, as he had just passed them.

The petition further alleges that the Argo was at the time on the east side of the river, out of the proper course of descending vessels, and was running at the dangerous and excessive speed of eighteen or twenty miles an hour, and that her sudden appearance, after clearing the tug and luggers, put the steamship in extreme peril, and that her pilot was compelled to take instant action to avoid a collision; but that the pilot of the Argo made no effort whatever to prevent the collision, although he could have done so at any time after the signals were exchanged by stopping the engine of the Argo and backing, or by keeping his course, or by putting his wheel to starboard.

The petition further avers that at the time the Argo began her voyage, and at the time of the collision, she was not sufficiently officered and manned, the only deck officer on board being James Brown, who was compelled to act as pilot, mate, wheelman and lookout, and could not and did not give proper attention to the navigation of his vessel; and that Hester and Blesine, who lost their lives by the collision, were shipped as part of the crew of the Argo.

The petition prays the benefit of the limited liability law, and for a decree exonerating the Dumois, and rejecting all claims for damages on account of the collision; but that in case both vessels are found in fault, that the damage suffered by the Dumois from the collision may be allowed as an offset against any award in favor of Springer; and further, that if full damages shall be given against the Dumois in favor of the crew of the Argo for their effects, and in favor of the heirs of Blesine and Hester, that Springer be decreed liable to pay one-half thereof, to be deducted from any amount awarded him for the loss of the Argo.

Mrs. Blesine has filed a libel *in personam* against the owners of the Dumois, claiming $10,000 damages for loss of her son (Rec., p. 12), but after the petition for the benefit of limited liability was filed her libel by agreement was consolidated (Rec., p. 16). The crew of the Argo also filed an intervention, claiming $319.20 for the loss of personal effects (Rec., p. 5).

Mrs. Hester came into the consolidated cause and propounded a claim on behalf of herself and minor child for $10,000 for the loss of her husband (Rec., p. 30).

The case was then tried, practically, upon the petition of the owner of the Dumois, claiming the benefit of the limited liability law, and the answers of these several libellants to that petition.

The libel of Mrs. Blesine, treated under stipulation as an answer to said petition, avers that while the Argo was more than a mile distant in the middle of the river, her master, who was also a pilot, first noticed the Dumois ascending on the east bank, and waited for her to signal, but finding that she did not do so, blew one whistle, indicating that he would keep his course and pass to starboard; that the Dumois came on for some time without replying, and then blew two whistles—crossing the signal of the Argo—to which the master of the Argo, she being the descending vessel, having least control of herself, and having the right of way, immediately replied with one whistle, and put her helm hard aport; that at the time, or, immediately after the crossing of the Argo's signal, the Dumois changed her course, swung across the river with great rapidity in the direction of the Argo, and when she arrived within two hundred feet blew the danger signal of three whistles, but continued on her course, until the Argo struck her.

In explanation and excuse for the conduct of the master of the Argo, the following averment is made (Rec., p. 14):

"Fourth—That said Argo was a very fast vessel, and when descending said river in the middle thereof, and observing said ascending steamer on the left bank thereof, was making fully eighteen miles per hour, and the courses on which steamers were proceeding were fully half a mile apart, and there was not the least danger of a collision had said ascending steamer kept her course, as she was bound to do, and as the master of Argo believed, and had a right to believe, she would do, until said ascending steamer crossed the signals of said Argo as aforesaid, *when, owing to the speed with which the latter was proceeding, and the fact that she was built for speeding forward and not backward, and could not be backed until her wheel—which was making 200 revolutions per minute—had stopped, and her engine reversed, when her ability to back against the strong current then running in the river was very slight* (*all of which was well known to the master of said Argo*), said master's judgment at the time of the crossing his signals as aforesaid was that it was best for him to continue his speed to get the better control of his vessel, port his helm and pass wide to the right of said ascending steamer, but which, owing to the speed of said ascending steamer, had not been stopped, he failed to do so, but struck her on her port bow as aforesaid."

The libel concludes by charging general fault on the part of the Dumois, without specifying any particular wrongful act.

Mrs. Hester makes, substantially, the same averments in her intervention and claim (Rec., p. 30).

Oscar M. Springer, in his answer (Rec., p. 36) avers that at the time the two vessels first exchanged signals the Argo was in her proper place in the middle of the river, and that the Dumois was ascending in her proper place, about 450 feet from the east bank, and that while the vessels were about three-quarters of a mile apart the master of the Argo noticed the red and white lights of the

Dumois; that when the Dumois arrived at a point about half a mile distant, and before she had given any signal, the Argo gave one blast of her whistle, indicating that she would keep her course and pass to the right; that the Dumois answered with two whistles, and commenced crossing the river and the course of the Argo, shutting out her red light and showing her green light, and that thereupon the helm of the Argo was put hard aport. In explanation of this movement (which was the immediate cause of the collision), the answer avers that "*the judgment of her master and pilot was that the very best thing he could do was, owing to the speed with which she was passing through the water and with the current, and the slight ability of the Argo to stop and back, which could not be accomplished in less than ten minutes, to put his helm hard aport, and proceed with all possible speed, and pass in front of said Dumois, which would have been accomplished had said Dumois, even after wrongfully crossing the signal and course of said Argo, stopped when she blew her danger signal*" (Rec., p. 36).

But in the libel filed the morning after the collision while the facts were fresh in the minds of the parties, it is alleged that the Dumois replied to the first signal of the Argo with two whistles, to which the Argo responded with one, and that the Dumois then altered her course and blew three whistles (danger signal).

Thus the libel distinctly admits that the Dumois replied to the second whistle of the Argo with the danger signal, but that the Argo did not change her course; while the answer alleges that the Dumois answered the Argo with two whistles, and immediately commenced crossing the river, and that thereupon the Argo ported and the Dumois then blew the danger signal. Such repugnance in pleading necessarily casts a cloud over the case attempted to be established by the libellant.

II.

The Law and the Evidence.

It is admitted by the pleadings of the libellant and of those who have propounded claims against the Dumois, that the Argo was so constructed as to be incapable of stopping when under full speed, as she was at the time of the collision, in less than ten minutes after reversing. Steaming at the rate of eighteen miles an hour she would go three miles before she could possibly stop. A craft so constructed and propelled being incapable of complying with the rules of navigation, is, we submit, practically an outlaw and a menace to commerce. Fault in this respect is of the same character and quite as serious as neglect to provide proper steering gear, lights and means of giving signals. Strange to say, this very defect in the Argo is given as an excuse by the master for not attempting to check her speed, and for his conduct in taking the desperate risk of attempting to pass ahead of the Dumois instead of reversing and stopping when the danger of the collision became apparent, as required by the rules of navigation.

The employment of such a vessel in commerce, even if permitted, should at least be conducted with the greatest skill and prudence, and navigated at a moderate speed, especially in the waters crowded with ships engaged in commerce on the Mississippi river between the great port of New Orleans and the sea. But considering that the Argo was without the necessary power to stop within a reasonable time; that the night was dark; that she was descending the river on the east bank, invading the course of ascending vessels, practically without a lookout, a speed of eighteen miles an hour was certainly excessive, dangerous and criminally reckless. What is or what is not a safe rate of speed has not been fixed by statute or the rules of navigation, but the following rule has been laid

down by this Court for all steam vessels in the case of the Pennsylvannia, 19 Wall. 125: "This may be safely laid down as a rule on all occasions, fog or clear, light or dark, that no steamer has a right to navigate at such a rate that it is impossible for her to prevent damage, taking all precautions the moment she sees danger to be possible; and if she can not do that without going less than five knots an hour, then she is bound to go less than five knots an hour."

The Syracuse, 9 Wall., 672.

Morgan vs. Stebbins, 10 H., 606.

McCready vs. Goldsmith, 18 H. 79.

Steamboat New York vs. Rea, 18 H. 233.

What would be a moderate speed for a vessel having power to control herself whenever required by an emergency, would be imprudent and reckless on the part of one having little or no power to stop and back.

State of Alabama, 17 F. R. 847.

If the Argo were in extremis, as claimed, when her master ported and attempted to cross ahead of the Dumois, when he ought to have reversed and checked her speed, or kept his course, or starboarded, any one of which movements would have avoided a collision, she was placed in this situation solely because she was going, to the knowledge of the master, at a reckless rate of speed, without power to stop. It was no doubt the speed of the vessel and the want of power to stop acting on the mind of the master which influenced him to port his helm and attempt to pass ahead of the Dumois, for he says that at the speed he was going it was his judgment that this was the proper course to take.

These faults were aggravated by the fact that Captain Brown was acting as master, pilot, helmsman and lookout, on a vessel requiring the utmost skill and vigilance to navigate safely. His attention was necessarily distracted by these numerous duties, rendering it impossible for him

to understand as clearly as he should the signals, the situation, and movements of an approaching vessel, and at the same time to navigate his own, especially in the night time, when objects are more or less dim and indistinct. It is true, he had a man, Charles Desseamus, a common deckhand, standing by him at the wheel, who, he says, acted as lookout. But this man, as Captain Brown says, was there to attend to the lights and to do errands, as well as to keep a lookout (Rec., p. 66), and he was not stationed forward, where he ought to have been. In his testimony this man says that when the Dumois first came in sight he told Captain Brown that he saw a vessel coming up, but he did not report her bearings, or the lights he saw (Rec., pp. 80-86), as he would have done, and ought to have done, if he had been in fact a proper lookout. He was practically a mere servant of the master, and of no assistance whatever as lookout. The truth is the Argo was shorthanded, at the beginning of the voyage, and committed a fraud on the law by taking two newspaper reporters, who performed no duty, as seamen. This, no doubt, accounts for the fact that there was no proper lookout on the Argo at the time of the collision.

These facts, which are either expressly admitted by the pleadings of the libellant and intervenors, or undisputed, show the character and conduct of the Argo just previous to the collision.

On the other hand, it appears from the pleadings of the libellant and the undisputed evidence, that the Dumois on the night of the collision was coming up the river close to the east bank, in her proper place, at a moderate speed, fully manned and equipped, all three lights burning brightly, with a regular lookout properly stationed on the bow, a seaman at the wheel, and a licensed pilot and the second mate on the bridge in charge of her navigation, keeping a vigilant watch.

The only matters of few in dispute, outside of the question

of the amount of damages, relate, 1st. To the situation of the Argo in the river at the time signals for passing were first exchanged; and 2d. What was done by the respective vessels to avoid a collision.

It is alleged by the libellant and intervenors that at the time the two vessels first came in sight of each other and exchanged signals the Argo was in the middle of the river in the customary and proper place for a descending vessel. We admit that her proper place was in the middle of the river, but assert that she was not there, but was, in fact, wrongfully descending close to the east bank, in the course of ascending vessels, contrary to law and usage. The evidence, as usual, in cases of this character, is conflicting; but we think your Honors, upon a brief review of the testimony, will find, as the Court of Appeals did, that she was where we place her—close to the east bank. The witnesses examined are those on board the respective vessels, and others who were on shore, or on the luggers at anchor near the new canal, just above the place of collision. Beginning with the officers and crew of the Dumois, we will now give a brief resumé of their testimony:

William Lumbard, licensed pilot in charge of the Dumois, being asked "Where was the Albert Dumois at the time you discovered the lights of the Argo?" answered, "She was just below the canal, a distance of a quarter or a half a mile, near the east bank of the river." Question—"Did you see the side lights and the white lights of the Argo?" Answer—"I saw her three lights, the red, green and the white lights." Question—"How far were you from the east bank when you blew the first whistle?" Answer—"I should judge about the ship's length" (Rec., pp. 240–241).

Question—"State whether you saw all three lights of the Argo dead ahead or otherwise?" Answer—"They were dead ahead; if anything, a little inside of us" (Rec., p. 242).

Nicholas Sibitsev second mate of the Dumois, who was on the bridge when the collision took place, being asked, "Where was the Dumois in the river when the lights of the Argo were first discovered," says, "She was close to the east bank." Being asked, "When you first saw the Argo's lights did you see all three at the same time?" says, "Yes, sir; they were dead ahead, a little inside of us, nearer the bank" (Rec., pp. 258, 259). On cross-examination he says, "The Dumois might have been the ship's length from the bank, say 210 feet" (Rec., p. 265).

Bernt Larsen, able seaman, says he was at the wheel of the Dumois when the collision took place, but not when the first signals were exchanged, being on the forward deck coiling a rope. He took the wheel after the Dumois gave the first signal, and it was then lying starboard, and the Dumois swung out from the bank—the Argo was then on her starboard (Rec., pp. 296–297).

Nicholas Theodore, an old river pilot who was on the tug Day Dream, tied up on the east bank of the river with a number of luggers, just above the New Canal, being asked how close the Argo came to him as she passed down, says, "She came so near he could see her color, and he was afraid she would run into him." Being asked, "Could you form an opinion as to how many feet off she was?" says, "I couldn't swear how many feet, I knew she was not the length of my boat, 109 feet" (Rec., pp. 225–226).

The crew of the Argo testify as follows:

Edwin C. Green, an experienced seaman, acting as cook, called by the libellant (Rec., p. 95), being asked what whistle he heard just prior to the collision, says, "The first whistle I heard was the Argo; she blew one whistle, which was responded to with two whistles—the Argo blew again, and was answered with two and then three short whistles."

Being asked what lights he saw on the approaching

steamer, he says, "I saw them all, the high light, I saw both the red and green lights" (Rec., p. 97). On cross-examination, being asked where he was when he heard the first signal from the Argo, says, "I was sitting by the stove in the galley" (Rec., p. 101). Being asked whether he went on deck and looked around when he heard the first signal. says, "I went on the steps and looked out; I had a view all around the river ahead of me; I saw the three lights when I first went out, then went back to put some coal in the stove" (Rec., p. 102). Just as he raised the lid of the stove he heard the alleged cross-signal of the Dumois, and looking out again saw only the green and white lights of the Dumois. It thus appears that before either vessel had changed her course they were *head and head*, both necessarily near the East bank of the river and the suggestion of counsel for libellant that this witness did not see the lights of the Dumois until she had starboarded for helm and changed her course is entirely without support.

Capt. James Brown, pilot, and *Charles Desseamus*, deckhand on the Argo, both say their vessel was in the middle of the river, and that they saw only the white and red lights of the Dumois when signals were first exchanged.

Robert Orkney, engineer of the Argo (Rec., p. 67), who came on deck and looked around while she was passing the Day Dream and luggers, being asked, "How far she was from these vessels," says, "I guess we must have been about in the middle of the river, because we were so far away. I could make out it was a tow by the lights, but couldn't see the vessel at all" (Rec., p. 69). But he was not on deck when the vessels first signaled after passing the tug and luggers, and does not pretend to know where his vessel then was. And coming up out of a lighted engine room, it is not at all strange that he could not very well see, but had to guess at the position of the Argo.

The evidence of the witnesses on the luggers examined by libellant is as follows:

Captain Jurich, master of the lugger *Admiral Takeit-off*, lying outside of the Day Dream, 50 feet from the bank (Rec. p. 90), says he saw the Argo coming down, and being asked where she was in the river, says, "I would'nt swear, but I think she was coming right in the middle of the river, a little more to the east it may be, a little more" (Rec. p. 91.) He admits that he did not notice what happened after the Argo passed him, and does not state where the vessels were when signals were exchanged (Rec., p. 94.)

Nicholas Dedes, pilot on the Day Dream (Rec., p. 148), says the tug was about making a landing with a lugger which had got adrift when he heard the Argo blow one whistle, and that the Dumois was then coming up just behind the tug, hugging the shore (Rec., p. 149), and answered with two whistles. He refers to the sketch at Rec., p. 157, showing the position of the two vessels before and at the time of the collision. He places the collision in the middle of the rive, "just abreast of the Day Dream, right opposite her" (Rec., p. 151.)

Being asked whether the Argo blew a whistle opposite the Day Dream, he says she was not quite opposite, and explaining his want of accuracy, he says: "I didn't pay any attention to that boat all the time. I wasn't taking notice of that boat at all" (Rec., p. 154). Being asked, when he saw the green light on the Dumois, he says: "After she blew two whistles and after the Argo blew one, and some other boat answered with two, that made me go on the port side of the boat, and then I saw the green light on the boat coming up" (Rec., p. 156).

Previously the witness was engaged in making his vessel fast. Being asked: "When you heard the Argo whistle and saw her coming down the river, you were in the pilots-house?" the witness says; "I was on the star-

board side." Q. "And you looked up the river?" A. "No, sir; I was looking on the bank. When I heard the whistle blow I looked up. I was just making a landing and my attention was drawn to the whistle" (Rec., p. 155).

In substance this witness says that when he heard the whistle of the Argo he was behind the pilot-house of the Day Dream, looking landward, while making her fast, and that he did not go to the other or port side and look around until he heard the *second* signal of the Dumois, which was given about the time of the collision, and that previous to this he gave no attention to the two whistles, having been distracted by the work of making the tug fast.

The sketch made by him, showing the supposed situation of the vessels prior to the collision, is purely fanciful and imaginary. Indeed, a mere casual reading of his deposition as a whole will show that he does not pretend to say where the Argo was when she passed the Day Dream. His silence on this point comes from his confessed ignorance. It is only by inference from the suggestions embodied in the questions of counsel for libellant propounded to him that he adopts the sketch at all as part of his evidence. For instance, counsel put the question, "Here is a boat (referring to the sketch) with a circle around the side of it, with the figure 1 on it—what do you take that to be; what boat do you call that?" "I suppose it was the Dumois." Question. "Here is No. 6 boat, what what would you take that to be, No. 6 coming down the rtver? Would you take that to be the Argo coming down?" Ans. "The only boat coming down was the Argo." It is doubtful whether he saw any of the occurrencies testified to, or whether he understood them if he saw them; for he locates the collision opposite the Day Dream, whereas it is conceded all around that the Argo delayed ten or fifteen seconds after passing the Day Dream

before giving her first signal. and that it was some seconds before she ported after the Dumois answered. The two vessels being half a mile apart when signals were exchanged, the Argo must have gone at least 1600 feet below the Day Dream before she could collide with the Dumois, coming up stream at half her speed.

If this point in dispute is to be decided according to the number of witnesses who have testified, the preponderance is clearly in favor of the Dumois. It appears from the affirmative evidence of Lumbard, Sibitsen and Larsen, viewing the incidents from the deck of the Dumois, and Green, viewing them from the deck of the Argo, that the lights of vessels were in full view to each when signals were first exchanged, which, probably, is the best possible proof that the Argo was descending near the east bank of the river, as it is conceded by everybody that the Dumois was close to that bank. It further appears from the evidence of Nicholas Theodore, master, who was on the Day Dream, that when she passed that tug she came down within less than 100 feet of him. As Lumbard and Sibitsen were giving their undivided attention to the signals, situation and movements of the two vessels, their knowledge of what took place must be more accurate than that of Brown, whose attention was necessarily distracted by his numerous duties, or that of Desseamus, the pretended lookout, who was at the same time acting as messenger, servant and lamp-trimmer, besides being a person of infinitely less experience and intelligence than Lumbard and Sibitsen.

The other witness, Robert S. Orkney, engineer of the Argo, was below in the engine-room when he heard the first signal of the Argo, and only came up after the vessels had changed their courses. Of the witnesses on the luggers, Dedes was behind the pilot-house, looking landward and engaged in making fast the tug when the Argo

passed him, and did not go around to the port side and look until after the Dumois blew two whistles. He admits that he paid no attention to what was going on, and does not say where the Argo was prior to the collision, except from inference in his answer to questions which attempted to put words in his mouth favorable to libellant's views. Jurich not only differs with all the other witnesses as to the signals exchanged, as we shall show in another part of this brief, but places the Argo east of the middle of the river. Nicholas Theodore, master of the tug, who was standing in the pilot-house and observed all that took place, says positively that the Argo came within 50 feet of him, which would be 100 feet from the east bank.

We have then Lumbard, Sibitsen, Green, Larsen and Theodore, who testify particularly that the Argo came down close to the east bank, against Brown and Desseamus, who affirm that she was in the middle of the river, and Orkney and Dedes, who did not see anything until about the time of the collision and merely guess at the prior situation, and Jurich who favors *our* views. Of these ten witnesses six of the most intelligent affirm the Argo was close to the east bank, head and head to the Dumois when signals were first exchanged, while four, two of whom saw nothing until the collision took place, testify to the contrary.

It is a significant circumstance in this connection that the Argo signaled the Day Dream once just above, and again as she got opposite her, indicating that she came so close to the Day Dream that Captain Brown considered it necessary to warn that vessel of his approach, which he would not have done if the Argo had been out in the middle of the river. But the most conclusive proof that the Argo was descending on the east bank of the river, "head and head" to the Dumois, is the fact that a collision was physically impossible if the Argo had been in the middle of the river and the Dumois within 400 or 500 feet of the

east bank when signals were first exchanged, as is alleged by Springer in his answer and testified to by some of the witnesses. The river at the place of collision, as shown by the map in evidence, is about 2450 feet wide, and the vessels were about half a mile apart at the time the signals were given. For all practical purposes the manœuvres took place in a section of the river 2500 feet square. Triangulating this square it will appear that the hypothenuse is about 3500 feet long, and crosses a line bisecting the square in the middle of the river at a distance of about 1750 feet from the east bank. To reach the point where the courses of the two vessels would cross, if the vessels were located as contended for, the Argo would travel 1250 feet in a direct line, and the Dumois, if even 500 feet from the east bank, would travel 1250 feet going up stream, as she was at an angle of 45 degrees. The Argo, therefore, going at the rate of 18 miles an hour directly down steam, would have gone 2500 feet before the Dumois could reach the crossing of the two courses. But Springer and the intervenors allege in their pleadings that as soon as the Dumois starboarded and shut out her red or port light the Argo put her helm hard aport. Both vessels would thus start for the middle of the river about the same time. It is manifest, therefore, that if the Argo had kept her course, as she did her speed, after these signals were exchanged, she would have passed the intersection of the two courses, in the middle of the river, before the Dumois could reach it, and gone half a mile below. On the other hand, if she were, in fact, in the middle of the river as claimed, when she ported her helm, she would have gone into the west bank before the Dumois could reach midstream. In this situation the result would have been the same if both vessels were running at the same rate of speed. All evidence, therefore, which attempts to locate the Argo in the middle of the river at the time signals were first exchanged must be rejected, which leaves

the testimony of the Dumois' witnesses undisputed, for otherwise there is no reliable proof as to the position of the Argo in the river.

It seems clear to us that the vessels must have been "head and head" to each other at the time they both started toward the middle of the river, and that the Argo, having delayed porting for fifteen or twenty seconds after the Dumois swung out, overtook and crossed her course at some point between the east bank and mid-stream.

In attempting to show how it was possible for vessels to come together with the Argo in the middle of the river, as it is claimed she was, and the Dumois close to the east bank, when their courses were changed, the astonishing proposition is advanced by counsel for libellant that as soon as the Dumois swung out from the bank the strong wind blowing from the east on her starboard beam doubled her speed, while the Argo descending with the current of the river was impeded by the wind and current beating against her stern after she ported. It may be that head winds and adverse currents increase the speed of vessels sailing against them, and that the speed of vessels sailing with the wind and current is impeded; but it is rather significant that a fact so contrary to natural laws has not been established by a single witness, or by reference to any printed book on the subject of navigation.

Some support to the contention that the Argo was in the middle of the river is sought to be drawn from the claim that her wreck has been located by a man named Buras, about 500 feet from the west bank of the river. This witness claims to have fished up a piece of rope and a door from the wreck (Rec., p. 109). The rope, it is claimed, was attached to the bow and stem, showing the vessels to have been about sixty feet long; but as the Argo was 110 feet long the identity of the wreck is not apparent. However this may be, the presence of the wreck at

the place is accounted for by the evidence of Robert S. Orkney.

He says that after the collision the life-boat of the Argo was put in the water, and he passed the painter to Captain Brown, and went below and started the engines, at the captain's suggestion, for the purpose of beaching her. She was headed toward the west shore. Being asked whether the Argo continued down the stream, he said, "We couldn't tell. She was pointed toward the bank when I went down to start her up the second time." Q. "She didn't stop from that time until you got off of her?" A. "No, sir, she was still going like a hog rooting" (Rec., p. 76). The small boat remained by her about three minutes after the collision, and during this time she was pointed toward the west bank with her engines running (Rec., p. 77). This accounts for her presence near the west bank, if she has been found there.

III.

Let us now consider what was done by the respective vessels to avoid a collision:

The Dumois, it is conceded, was ascending the river close to the east bank, in her proper place, at the time the Argo cleared the tug Day Dream and luggers, which were coming to a landing just below the New Canal. Until the Argo had so cleared her lights were mixed up with those of the tug and luggers, so that the pilot and mate of the Dumois were uncertain whether she was coming down or intended to make a landing with the other vessels, as all the lights appeared to be moving. These lights were mixed together, because those of the Argo were placed very low, the white light being on a level with the red and green, instead of being elevated above them, as is customary.

But as soon as the lights of the Argo came out and it could be seen that she was coming down the river, the

Dumois signaled her with two blasts of her whistle, indicating that she would pass on the starboard. The Argo answered with one whistle, and the Dumois replied with two, and immediately gave the alarm, reversed and backed. This is affirmed positively by Lumbard, the pilot (Rec., p. 341), Sibitsen, the mate (Rec., 259), Lund, the seaman at the wheel (Rec., p. 291), and Larsen (Rec., p. 296). All these witnesses say the signal of the Dumois preceded that of the Argo.

The evidence of the witnesses for libellant is contradictory and inconsistent.

Captain Brown says he signaled the Day Dream with one whistle as he passed her, and then she answered with one; that five or six seconds after he passed the Day Dream he saw the lights of the Dumois coming up half a mile below, and blew one blast of his whistle, which the Dumois answered with two, and he then saw she had starboarded her helm, and after waiting 15 seconds he repeated his whistle, and at once ported his helm (Rec., pp. 49–58). He denies that the Dumois answered his second signal, but admits that she gave the danger signal and reversed. Just here the collision occurred as the direct result of his porting. He admits that the engines of the Dumois had been stopped before the vessels struck (Rec., pp. 50, 51). He says he first saw the lights of the Dumois when she was three-quarters of a mile away, but delayed giving a signal until the Argo had passed the tug and luggers and the vessels were half a mile apart, because he was waiting for the Dumois to blow first (Rec., p. 57). On cross-examination, he says he thus delayed because he understood the rule to be for the ascending vessel to blow first (Rec., p. 57). He did not change his course, as his signal indicated he had done, but waited, as he admits, 15 seconds, and only ported after he saw the red light of the Dumois disappear and the green come out, thus steering directly for her. Being asked why he did

not sound the alarm, reverse and back when he saw the green light of the Dumois, he says he made sure, owing to the velocity at which he was going, that he could clear her (Rec., pp. 58, 64, 65); that this was his judgment as to what should be done under the circumstances.

Orkney, who was in the engine-room of the Argo, testifies, on cross-examination, to having heard only a single whistle from the Argo to the Day Dream, and that a few minutes afterward he heard a second whistle by the Argo, and then heard the cross signal of the Dumois, and that the Argo blew again, and the Dumois then blew the toot whistle, and the collision followed (Rec., pp. 74, 75).

Desseamus says that he and Captain Brown both saw the red and white lights of a steamer (the Dumois) when the vessels were three quarters of a mile apart; that Captain Brown waited for the Dumois to blow, but as she did not do so, he blew one blast of his whistle; that about 12 or 15 seconds after he got an answer of two whistles, and then Captain Brown immediately blew again, but got no answer; then the collision (Rec. p. 83). On cross-examination, he tells a different story. He says he first saw the lights of the Dumois 15 seconds or a minute after the Argo saluted the Day Dream.

Edwin C. Green says he heard first a signal whistle of the Argo, and a response of two whistles, and then another whistle from the Argo, and a response of two whistles, followed by the alarm (Rec. p. 96); but he does not testify to having heard the signals given by the Day Dream.

Captain Jurich heard the Argo give one whistle for the Day Dream, but heard no answer; then after a little while heard four whistles, then saw the little boat hit the big one. (Rec. p. 91.)

This witness being recalled (Rec., pp. 107-8), says the Argo blew one whistle for the Day Dream, then she blew

four for the steamer, which the steamer answered with four.

Nicholas Dedes says the Argo blew one whistle when 150 yards above the Day Dream, which the Day Dream answered; then another opposite the Day Dream, then he heard two which the Argo answered with one; then the Dumois answered with the danger signal and the Argo answered with the danger signal (Rec., pp. 149, 153-54).

Nicholas Theodore says the Argo blew one whistle for the Day Dream, and she answered, and then blew another, but he didn't know whether she was blowing for him or for some one else. He heard no whistle from the vessel coming up (Rec., pp. 224-6).

This evident confusion in the minds of the witnesses who have testified in regard to the signals from the standpoint of the Argo, completely destroys the value of libellant's evidence in this respect. It is more than probable that the whistles of the Argo and Day Dream were weak, as is usual on small vessels, or were not blown very loud, and for this reason were not heard by the Dumois, but that Captain Brown heard the signal of the Dumois just after he whistled to the tug, and thought in the confusion of the moment that his signal had been crossed, certainly the evidence of Lumbard and Sibitsen and those on board the Dumois, whose hearing was not distracted by these numerous whistles, and who were giving undivided attention to what took place, ought to be conclusive as to which vessel gave the first signal.

Summing up the claims as to what was done by the respective vessels to avoid a collision, it appears, (1) according to the story of Captain Brown, that he first discovered the Dumois when he was some distance above the tug Day Dream and luggers; that he signaled the tug once above, and again when opposite her, with one whistle, and was answered with one whistle; that after he

passed her, five or six seconds, he blew one whistle for the Dumois (but did not port in compliance with his one signal); that the Dumois replied with two whistles and starboarded her helm; that when he saw her change her course, her red light dissappearing and the green coming out, he blew one whistle again and put his helm hard aport; that there was an interval of fifteen seconds between his first and second signal, during which he kept his course and speed before porting. (2) According to the statement of Lumbard, the pilot, and Sibitsen, the mate, the Dumois gave the first signal and starboarded, but upon receiving a cross signal from the Argo, repeated his whistles, and followed it immediately by the alarm signal, and reversed and backed.

She thus did what this Court expressly sanctioned in The Victory and Plymothean, 168 U. S., 410—stopped her engines and backed. The Argo did nothing but port, and go directly for her at full speed.

The evidence given by the master of the Argo in defence of his conduct is: 1st. That his vessel was in her proper place in the middle of the river at the time signals were first exchanged, far away on the port side of the Dumois, which justified him in not porting when he blew his first whistle. This we have shown to be untrue. 2d. That he did not reverse and stop when the Dumois crossed his signal and danger became apparent, because the Argo was built for speeding forward and had so little power to back that she could not be stopped inside of ten minutes (three miles). 3rd. That he ported when the Dumois changed her course, because in his judgment he thought that on account of the great velocity at which she was going the Argo could pass ahead of the Dumois, and that if he committed an error in taking this course, it was committed in the extremis, caused by the fault of the Dumois. Conceding the existence of the facts upon which these excuses are predicated, and judging him upon

his own acts, he was clearly guilty of the grossest fault in not reversing and backing the moment his signal was crossed and the danger of a collision became apparent, as required by the 21st rule, Sec. 4233, U. S. R. S., independent of any fault on the part of the other vessel. But it is perfectly clear that it was the inability of the Argo to comply with this duty on account of her construction and the great speed at which she was going, and not the conduct of the other vessel, which caused the error of judgment now pretended to have been occasioned by the extreme peril of the moment.

We submit that the whole situation of peril, according to conceded facts, was brought about by the primary fault of the Argo in going down the river in the night so near the east bank of the river, out of her proper place, at a reckless rate of speed, without possessing the requisite power to stop, as required by the rules of navigation in a situation involving the danger of collision with other vessels. A vessel navigating at such a tremendous speed should at least have a lookout, a man at the wheel, and a competent officer in command on deck, who should give his undivided attention to her navigation, even when in her proper place.

It is alleged in the pleadings, and admitted by all the parties to the case, that the vessels were within half a mile of each other when their respective lights became visible, which would bring them together in about sixty seconds at the rate of speed they were running. The Dumois was coming up within about the ship's length from the east bank, with the tug Day Dream and several luggers coming to a landing just above, with their lights moving, which warned her to give them a wide berth. In this situation, brought about solely by the Argo, she was compelled to act on the instant. Unable to port her helm without grounding or running into the tug and luggers, the pilot starboarded and swung out from the bank, giving notice

of the movement by the proper signal. While it is true that vessels meeting end on are required by Rule 18, U. S. R. S. 4233, to port, Rule 24 provides that "in construing and obeying rules due regard should be had to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger." The circumstances here referred to have been held to be a rock, a bar, or a third vessel.

The Maggie J. Smith, 123 U. S. 349.

Besides complying with the special rule every vessel is subjected to the paramount duty to avoid a collision in any situation, if possible.

The master of the Argo, having just passed the tug and luggers, must have known that the Dumois would be compelled to make the movement she did on account of these very circumstances, and was clearly in fault in not governing herself accordingly. But we submit that the course taken by the Dumois, if erroneous, was caused by the situation brought about by the gross faults of the Argo, which we have enumerated above. The Court of Appeals found the Dumois partly in fault because in executing the movement to avoid the tug and luggers, she then had the Argo on her starboard, and was required in this situation to keep out of her way. If the fifth situation applies to vessels meeting head on, as the Court of Appeals seemed to think, but which we doubt, as in terms it applies only to vessels approaching obliquely, then it was the clear duty of the Argo to keep her speed and course, in which case there would have been no collision. Instead of doing this, she tardily ported and changed her course, which was the sole cause of the accident.

The Britannia, 153 U. S., 130.

The master of the Argo seems to have acted on the theory that having on board some newspaper reporters who were chasing up a Congressional Committee on board

the steamship Whitney, that he was in some way privileged with the right of way, and had the right to run his craft anywhere in the river, with the speed of a limited express train, and that every vessel was bound to get out of his way.

IV.

The case of the Argo has been argued on the theory that the Dumois was the first to make a departure from the rules of navigation, and that for this reason the Court should not consider the fault of the Argo, however flagrant. No such principle has ever been, or can be, sanctioned by the Admiralty Courts, for it would eliminate from our jurisprudence the whole doctrine of contributory negligence in collision cases, as from the very nature of this class of accidents one of the vessels must necessarily commit the initial error. As this Court said in The America, 92 U. S., 432, " Not even flagrant fault on the part of one vessel will authorize the other to run her down, nor excuse the other from adopting every proper measure to prevent an accident."

Not only is this laid down a rule by the Courts, but the statute enacted for the purpose of preventing collisions equally imposes duties on both vessels, and prescribes a rule of conduct for both whenever the danger of a collision becomes apparent, without regard to the manner in which the situation of peril may have been brought about, or which vessel may have made the first departure from the rules—each is required to slack her speed, and, if necessary, to stop. Rule 21, R. S., Sec. 4233.

We have taken pains to examine the numerous cases where damages have been divided, but in none of them does the Court recognize the rule contended for by appellant.

In Chamberlain vs. Ward, 21 H. 564, the Court held the propeller in fault (1), because the propeller had not a

competent officer on deck; (2), because she did not have bright signal lights; (3), because she did not change her course after discovering the lights of the other vessel. The Court held the steamboat in fault (1), because she did not sooner discover the character of the propeller, notwithstanding she failed to exhibit side lights; (2), because she did not seasonably change her course and stop her engines, so as to avoid a collision, until all reasonable expectation of avoiding it was gone, and then ported; (3), because she did not have a vigilant and competent lookout, the second mate having had charge of the general management of the vessel, as well as charge of the deck.

It was contended on behalf of the steamboat that the propeller, being first in fault for not carrying proper lights, should be charged with the whole loss; but the Court divided the damages.

In Rogers vs. Steamer St. Charles, 19 H. 108, the Court held a schooner at anchor in a narrow channel in fault for not constantly exhibiting a white masthead light, and a steamer was also in fault in passing through the channel at too great a rate of speed.

In Schooner Catherine vs. Dickensen, 17 H. 170, two sailing vessels were held mutually in fault because the one close-hauled, luffed previous to the collision when she should have kept her course, and the one having the wind free did not have a proper lookout. Notwithstanding that the luffing vessel was the first in fault, the damages were divided.

In the Sapphire, 11 Wall. 164, vessels at anchor near each other were held mutually in fault because one did not put out an extra anchor in a storm, and the other for not hoisting a jib during a storm.

In the Ariadne, 13 Wall. 475, a brig was held in fault for not keeping her lights burning brightly, and a steamer for not keeping a sufficient lookout, and the damages divided. Here it was held that it was the duty of the

steamer to stop and slow her engines to avoid a collision, notwithstanding the first fault in the brig's lights.

In the Continental, 14 Wall., 345, each steamer was held in fault, one for not carrying the side lights required by law, the other for not sooner discovering the character of the first and taking steps to avoid a collision. A steam vessel has no right to assume that another steam vessel, owing to the absence of lights she should carry, is a sailing vessel and run her down.

In Atlee vs. Packet Co., 21 Wall. 389, the Court held the owner of a pier, because erected in the river without authority of law, in fault, and also a vessel colliding with it in fault because the pilot did not use proper diligence to discover it. Here the primary fault was that of the party who erected the pier.

In the case of The Pennsylvania, 19 Wall. 126, cited to show that in case a vessel has committed a positive breach of a statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not do so, it appeared that the steamer was running at an excessive rate of speed in a fog in violation of law, and that the sailing vessel used a bell in place of a fog-horn prescribed by law, and the Court held both in fault, because neither could show that her individual fault did not contribute to the collision.

In the Teutonia, 23 Wall. 77, both steamers were held in fault for the collision in the night where neither took any steps to avoid it, after they had failed to come to an agreement as to passing.

In the Sunnyside, 91 U. S. 208. This was a collision between a steam tug and a sailing vessel. The former was lying three miles off shore, near the head of St. Clair river, with her machinery stopped, waiting for a tow, as is customary. She had the lights of a steamer under way. The lookout on the sailing vessel reported the light to the officer of the deck who replied that the steamer could

take care of herself, and paid no further attention to the matter until it was too late to avoid a collision. Neither vessel did anything. But the Court found both in fault, holding that both had a duty to perform independent of the light; that the neglect of one did not excuse the neglect of the other to adopt measures necessary to avoid collision, citing Steamship vs. Rumball, 21 H. 383, and Chamberlain vs. Ward, Ibid 568.

In the America, 92 U. S. 432, the Court held that steam vessels meeting head on, so as to involve the risk of collision, in absence of special construction, must both port seasonably, so as to prevent a collision, and that this duty equally rests on each vessel, and that even flagrant fault on the part of one will not authorize the other to run her down, nor excuse the other from adopting every proper measure to prevent an accident, and divided the damages.

In the Stephen Morgan, 94 U. S. 599, a sailing vessel and a steamer collided. The sailing vessel altered her course twice, and the steamer failed to keep out of her way. Both were held in fault.

In the Manitoba, 122 U. S. 97, both vessels were held in fault—the Comet, because she threw herself across the course of the Manitoba, and the Manitoba, because she failed to slow down and stop.

In the case of Belden vs. Chose, 150 U. S. 699, the two steam vessels were approaching each other in the Hudson river at night, head and head. One gave a short blast of the whistle to pass to the right, the other answered by a similar blast, and then gave two whistles and changed her course so as to cross the bow of the first. (But the question of mutual fault was not passed on, being a writ of error to Court of Appeals of New York.)

In the Britannia, 153 U. S. 130, both vessels were held in fault, the Britannia because she came so close to Governor's Island in coming into East river that she could not

bring herself quickly enough on her proper course to clear the Beaconsfield, and the Beaconsfield because as the preferred vessel she did not keep her course and speed, as required by the rule governing vessels in the fifth position.

The most that the Court has ever said on the question is found in the case of the Maggie J. Smith, in whom it is said that where one vessel has put the other in a position of danger by a wrong manœuvre, the Court will not examine to see whether the other has exercised the highest degree of skill in her management. But we submit that these remarks are entirely applicable to the Argo, which first committed the most flagrant faults in being without power to stop in the presence of danger, and in going down the river in the night time in the course of ascending vessels, at a reckless rate of speed, without a proper lookout, and in not porting her helm when she blew her first signal, and in tardily porting after she claims her signal was crossed, instead of checking her speed and stopping. Indeed, her reckless speed and inability to stop seems to be her only excuse for adopting a course which caused the collision. It was the primary fault of the Argo which brought about the position of peril. They afford ample excuse for any error of judgment on the part of the officers of the Dumois, but none to those of the Argo whose gross faults were the sole cause of the situation.

V.

As to the Value of the Argo:

The general rule, no doubt, is that it is the market value of the vessel at the place of the collision, and not the special value to the owner, that is to be considered in assessing damages in cases of collision. Leonard vs. Whitwill, 19 F. R. 547.

The Argo was built in 1878 by the Herreshoff Com-

pany, in Rhode Island, the contract price being $18,000. J. B. and N. G. Herreshoff and C. W. Young (Rec., p. 302), members of the company, say she would depreciate by age since then from 33 to 50 per cent., notwithstanding she may have been kept in repair, or partly rebuilt.

S. S. Delano (Rec., p. 131), one of the libellant's witnesses, says she was sold by the original owners in 1884 to the Gros Point Navigation Company for $10,744.63.

E. H. Gillman (Rec., p. 135), another witness for libellant, says she was sold by that company for $7000 or $9000, but was then worth $12,000.

Thos. E. Miller (Rec., p. 144), who repaired her in 1893 and 1895 at an expense of $5924, puts her value then at $20,000, though he says he has had no experience in selling boats.

The libellant, Springer (Rec., p. 198), says he bought her in 1895, after finding she was in perfect repair and condition, for $2500, and that just before the collision he sold half of her to one Bagley for $7500. But he had previously offered her, as he says, and Hon. T. M. Miller testifies (Rec., p. 238) for $11,000.

D. M. Cochran (Rec., p. 142), who examined her for Springer before he purchased her, valued her then at $18,000, and so does F. E. Tarsney (Rec., p. 124), a lawyer.

Babcock (Rec., p. 139) says she was repaired in 1893 at a cost of $10,000 and was then worth $17,000.

Frank Huettman (Rec., p. 121), who never built or bought a boat, values her at $25,000.

Capt. T. J. Woodward (Rec., p. 276), of Woodward, Wight & Co., who has had great experience, values her at between $8000 and $9000.

Springer himself says he bought her for $2500 (Rec., p. 198), but places her value at $20,000 (Rec., p. 195).

While the market value is the test, we think it can be

more accurately arrived at by adding together the amount of the several sales actually made and negotiated and getting an average.

Price of sale to Gros Point Company.....	$10,644
Price of sale by Gros Point Company, say.....	8,500
Price of sale to Springer	2,500
Sale to Bagley.....	15,000
	4)36,640
	$9,160

While counsel for libellant insists that the Court should adopt the price said to have been agreed to be paid by Bagley for a one-half interest in the Argo, as a basis of value, he at the same time contended that the prices previously paid by the different purchasers when she was younger and more valuable should not be considered. But it seems to us that if the price agreed to be paid by Bagley is evidence of value, that actually paid for the vessel by Springer ($2500) two years previous, after she was, as is claimed, rebuilt and made better than new, is entitled to much greater weight. The Court can not shut its eyes to the fact that such crafts as the Argo have no fixed commercial value, and that they constantly depreciate in value with age. Besides this, pleasure yachts soon become obsolete, and are cast aside for new models which take their place in the fickle fancy of those rich people who can afford to own them. No better evidence could have been introduced in this aspect of the case than that of the builders of the Argo, John B. and Nathan G. Herreshoff, the most eminent builders of this class of vessels in the United States. The first of the above named witnesses says, "Age depreciates the value of all vessels, and in a vessel of the Leila's (now the Argo) age, the depreciation would probably be from one-third to one-half the original value. We find in practice that the depreciation would

take place no matter if the boat has been renewed in part, either by rebuilding the hull or by replacing machinery." (Rec. p. 303).

"The element of speed is an item, but does not add to the selling value as much as is generally supposed. The other elements are comfort and safety." (Rec., p. 304).

N. G. Herreshoff says that "a yacht like the Leila (Argo) would depreciate in 19 years at least 33 per cent. notwithstanding repairs and renewal. The probability is that nine out of ten vessels reaching the age of 19 or 20 years would not be worth one-third of their original cost" (Rec., p. 306). As none of libellant's witnesses pretend to know the first cost of such a craft as the Argo, their evidence is entitled to no consideration as opposed to that of these eminent experts. It seems perfectly clear that the Court of Appeals erred in disregarding this, the most competent evidence on the question of value, and in reverting to the price of a single alleged sale as the measure of damages.

Interest was not allowed Springer, either by the District Court or by the Court of Appeals; but without assigning error in this respect on the present appeal, he prays that interest be decreed by this Court from the date of the collision.

But the action of the Court of Appeals, can not, we submit, be reviewed here in the absence of an assignment of error as to this ruling; nor is it subject to review, as the allowance of interest on damages in cases of this character is not a matter of right, but rests in the discretion of the lower court.

The Scotland, 118 U. S. 518.

Moreover, interest was not claimed or prayed for by Springer in his libel, and the Court of Appeals was not called upon to exercise its discretionary power, and can not, therefore, be charged with error for refusing to allow interest as part of his damages.

Whether the judgment of the Court of Appeals carries with it interest as a right, where it does not expressly provide for interest is a different question. If it does, the omission of such a provision is not material. But there seems to be no statute of the United States on the subject except Sec. 966 U. S. Revised Statutes, which provides that "Interest shall be allowed on all judgments in *civil causes* recovered in a Circuit or District Court, in all cases when by the law of the State in which the Court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment at such rate as is allowed by law on judgments recovered in the courts of such State." But it is to be observed that this statute is, by its terms, confined to civil causes, and does not extend to cases in admiralty, as to which interest is governed by a different rule.

Hemmenway vs. Fisher, 20 H. 255.

But if this section of the Revised Statutes can be held to apply to the cases in Admiralty, there is no statute of the State of Louisiana allowing interest on monied judgments. Indeed, Article 553 of the Code of Practice declares that "interest shall not be allowed by the judgments unless the same has been expressly claimed." Hence the rule is firmly established in that State "that interest can not be collected on a judgment for money, which, by its terms, is silent as to interest."

Succession of Anderson, 33 La. An. 581.

As judgments of the Federal Courts do not carry interest under the common law (Mass. Ben. Ass'n vs. Miles, 137 U. S., 689), and the statutes of the State of Louisiana give none, it is only when cases come to this Court on appeal that the question can be dealt with. Here clause 4 of Rule 23 provides that in cases in Admiralty "interest shall not be allowed unless specially directed by this Court.

This rule was no doubt adopted in view of the fact that decrees in Admiralty cases do not bear interest unless so decreed by the Lower Court in the exercise of its discretion, or allowed by this Court in view of some special circumstance which may appeal to its sense of equity.

Washington & Georgetown Railroad vs. Harmon, 147 U. S. 571.

Interest is given on money demanded as damages for delay in payment, and where it is expressly reserved in the contract it is part of the debt and is recoverable as of right; but when given as damages it is often matter of discretion. In the latter case it may be and is decreed in necessary instances.

Redfield vs. Iron, 110 U. S. 174.

It has been often allowed by this Court as damages in cases where appeals and writs of error have been taken for delay. But we find no instance where a party has been allowed interest under this rule in a case where he has delayed the execution of a judgment recovered by him by an appeal, as he has here.

The delay in this case having been caused by Springer's own action, which has deprived the judgment debtor of the power to pay, there is no ground upon which to base a decree for the allowance of interest by way of damages for that delay.

As has been decreed by this Court, "Whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay, interest is allowed for the delay or defiance of the debtor."

United States vs. Sherman, 98 U. S. 567.

This question does not affect Mrs. Hester, Mrs. Blesine and the members of the crew of the Argo, none of whom have appealed, and, therefore, no interest can be allowed them in any event.

VI.

As to Measure of Damages for Loss of Life.

It is settled, at least in the Admiralty Courts, that the deceased had no right of action for their own suffering, which they could transmit under C. C, 2315, as their deaths were practically instantaneous.

The Corsair, 145 U. S. 336.

Mrs. Hester must, therefore, recover on her own behalf and that of the minor child for loss of support under the last clause of that article as amended (Acts 1884, p. 94): "The survivors above mentioned may also recover the damages sustained by them by the death of the parent, or child, or husband, or wife, as the case may be."

Mrs. Blesine's claim rests on C. C. 245, and this is based on the loss of the right to demand alimony of her deceased son. The amount of alimony is regulated by the wants of the person requiring it and the circumstances of those who must pay it, and the obligation may be satisfied by obligor taking the obligee into his house. C. C. 230 to 235.

The right is manifestly less valuable than that of the wife and minor child for the loss of support.

In some of the States the value of a life is fixed by statute, as follows: Illinois, Minnesota, New Hampshire, New York, West Virginia and Wisconsin, $5000; Colorado, from $3000 to $5000; Connecticut, Maine and Massachusetts, from $500 to $5000; Kansas, Utah and Ohio, $10,000.

But the Supreme Court of the State of Louisiana, whose decisions must be held to control in all cases arising here, in the absence of a statute, allows much less, as will be seen from the following cases:

27 An. 713, child for death of mother.....$2,500
39 An. 1011, mother and minors for death of father 5,000

44 An. 692, father for death of son..... 2,000
42 An. 114, father for death of son..... 2,500
42 An. 824, father and mother for death of child.. 250
43 An. 63, father and mother for death of child.... 1,000
37 An. 630, father for death of son..... 1,000
37 An. 650, father for death of son..... 1,100
35 An. 699, mother and children for death of father 2,500
41 An. 964, father for death of son..... 2,000
40 An. 178, widow and minors for death of father 3,000
46 An. 1543, father for death of son..... 1,000
46 An. 185, mother and child for death of father.. 3,000
47 An. 1391, father for death of child..... 1,500
49 An. 86, father and mother for death of child... 2,500
48 An. 1047, father and mother for death of child.. 1,800

Under these decisions the Court seems to have allowed the wife and children from $2500 to $3000; and the father and mother from $1000 to $2000 for loss of support.

VII.

The Court of Appeals did not err in allowing the claimant of the Dumois to recoup one-half the damages allowed for the loss of life, and for the personal effects of the crew, against the amount recovered by Springer, if both vessels were in fault, notwithstanding that the Argo was a total loss. This point is disposed of by the cases of the North Star, 106 U. S. 17, and the Chattahoochee, 173 U. S. 540.

The Court of Appeals allowed the crew of the Argo only one-half of the value of their personal effects lost in the collision, on the theory that they partook of the fault of their vessel. Whether the Court erred in this respect, however, is not material, as they have not appealed and can not claim any relief in this proceeding.

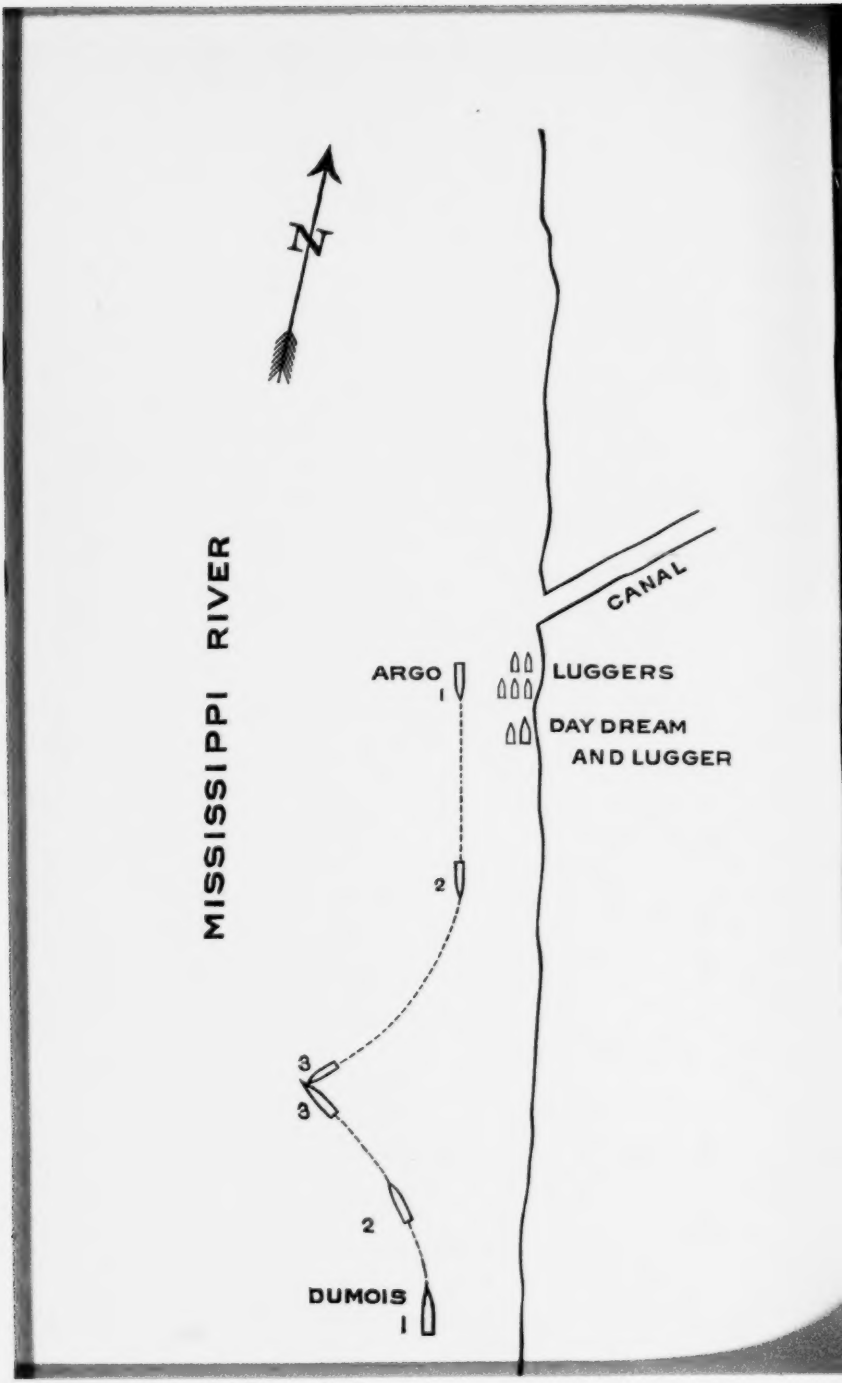
In conclusion, we submit that the decree of the District

Court and the Circuit Court of Appeals should be reversed and set aside; and that a decree be now entered, or directed to be entered by the said Court or Courts, in favor of Anders Jakobson, claimant of the steamship Albert Dumois, dismissing the libels and claims of Oscar M. Springer, Mrs. Harrison P. Hester, tutrix, etc., and Mrs. Marie Bourgeois DeBlesine, and of the crew of the yacht Argo, with costs, and appellant so prays.

Repectfully submitted,

JOHN D. ROUSE,
WILLIAM GRANT,

Proctors for Anders Jakobson, Claimant and Appellant.


N
MISSISSIPPI RIVER
CANAL
ARGO
1
LUGGERS
DAY DREAM
AND LUGGER
2
3
3
2
DUMOIS
1

Supreme Court of the United States,

OCTOBER TERM, 1899.

OSCAR M. SPRINGER, *Libellant, Petitioner,* *against* ANDERS JAKOBSEN, Claimant of the Norwegian steamship ALBERT DUMOIS.	No. 139.
ANDERS JAKOBSEN, Claimant of the Norwegian steamship ALBERT DUMOIS, *Petitioner,* *against* OSCAR M. SPRINGER and others, *Respondents.*	No. 272.

SUPPLEMENTAL BRIEF ON BEHALF OF THE ALBERT DUMOIS.

First.

The collision occurred in the Mississippi River, about eighty miles below New Orleans, in the early morning of January 28, 1897, between the steamship *Albert Dumois* and the steam yacht *Argo*.

The navigation of the two steamers was, therefore, by virtue of the Act of February 19, 1895 (28 *U. S. Statutes at Large*, 672), governed by the Congressional Rules and Regulations of April 29, 1864, reproduced in the United States Revised Statutes, § 4233, and by such regulations of the Supervising Inspectors, made under § 4412, as were applicable to the waters.

It is asserted by the counsel for the *Argo* in his brief (*p.* 61), that the particular waters in which the collision occurred had been exempted from the operation of any regulations of the Supervising Inspectors. In this assertion he appears to be mistaken.

The Supervising Inspectors had three sets of regulations extant in January, 1891, which had generally been in force subject to occasional amendments since 1871.

These regulations were commonly designated:

A. Pilot Rules for Atlantic and Pacific Coast inland waters.

B. Pilot Rules for Western Rivers.

C. Pilot Rules for the Great Lakes and for connecting and tributary waters.

The first mentioned set of rules was headed:

> " Rules and regulations for the government of " pilots of steamers navigating harbors, rivers and " inland waters (except the Great Lakes, the " Red River of the North, and rivers emptying " into the Gulf of Mexico, and their tributaries) " when meeting or approaching each other, whether " by day or night, and as soon as fully within sound " of the steam whistle."
>
> *Edition of* 1896, *p.* 73.

The second set of rules was headed:

> " Rules and regulations for the government of " pilots on steamers navigating the Red River of " the North, and rivers whose waters flow into the " Gulf of Mexico and their tributaries."
>
> *Edition of* 1896, *p.* 82.

The third set of rules clearly was confined to the Great Lakes and their connecting waters, and admittedly are not relevant to in this case.

Edition of 1896, *p.* 86.

The caption of the second set of rules—the Pilot Rules for Western Rivers—would lead the careless reader to assume that the rules were applicable to any collision in the Mississippi River. And it is rather an odd circumstance that the master of the *Argo*, at least for some weeks after the collision, and up to the time he gave his deposition, believed that he was subject to those rules (*Brown, pp.* 53, 57). It is clear, however. that they were not applicable, the special waters between New Orleans and the Gulf of Mexico being eliminated by the concluding rule:

> " Rule XIV: ' The line dividing jurisdiction be-
> " tween the pilot rules on Western rivers and har-
> " bors, rivers and inland waters at New Orleans,
> " shall be the lower limits of the city."
>
> *Edition of* 1896, *p.* 85.

The counsel for the *Argo* is therefore correct in his assertion that the Pilot Rules for Western Rivers were not applicable.

We contend, however, that the first set of rules, to wit: the Pilot Rules for Atlantic and Pacific Coast Inland Waters was applicable.

While it is true that the caption of such rules appears to except " rivers emptying into the Gulf of Mexico" from those " harbors, rivers and inland waters" for which the rules were promulgated, the text of the rules makes it clear that they covered the Mississippi from the Gulf as far as the southern limit of the City of New Orleans.

The closing paragraph of Rule IX, reads:

> " The line dividing jurisdiction between the pilot
> " rules on the Western rivers and harbors, rivers
> " and inland waters at New Orleans, shall be the
> " lower limits of the city."
>
> *Edition of* 1896, *p.* 75.

Thus it appears that the second set of rules, to wit, Pilot Rules for Western Rivers, were applicable to the waters of the Mississippi only above the lower limits of the city of New Orleans, while the first set of rules, to wit, Pilot Rules for Atlantic and Pacific Coast Inland Waters, covered the waters of the Mississippi below the lower limits of New Orleans, in which waters this collision occurred.

Certainly the Supervising Inspectors never intended to exempt from their jurisdiction the important waters stretching from the Gulf of Mexico to New Orleans, one hundred and fifty miles in length, and anything but a cursory reading of their regulations shows that they have, in fact, provided for those waters.

Their action in designating and defining a line "dividing jurisdiction" between two sets of their regulations, necessitates the conclusion that they have provided for one side of the line by one set of regulations and for the other side of the line by the other set.

The action of the Secretary of the Treasury in designating and defining (28 *U. S. Statutes at Large*, 672) a line outside the mouth of the Mississippi to divide the high seas from "rivers, harbors and inland waters" (*Record, pp.* 172-174) effectually settles the question that the waters in which the collision occurred were subject to § 4412 as well as to § 4233, and were therefore subject to the regulations of the Supervising Inspectors; and further that such waters were subject to the particular set of regulations established by the Supervising Inspectors for the Atlantic seaboard (*Edition of* 1896, *p.* 73).

Second.

The collision was due solely to the faults of the *Argo*.

A. In that she was proceeding down the river upon the east bank, while, by the customs of navigation, she should have been in the middle of the river;

B. In porting after the *Albert Dumois* had given a signal of two blasts.

C. In that, when a cross-signal arose between her and the *Albert Dumois*, the *Argo* disregarded the provisions of Rule III. of the Supervising Inspectors and omitted to blow a danger signal and stop and reverse.

In this connection we insist that the cross signal was made by the *Argo;* but as the contentions of the *Argo* are otherwise, we reserve the disputed question for subsequent consideration.

D. In not maintaining a proper lookout.

Third.

If, in fact, as we assert, the *Argo* was proceeding down the east bank of the river, instead of in the middle of the river, her fault in this respect was the first fault.

It was the duty of the *Albert Dumois* to lay her course along the east bank of the river.

It was the duty of the *Argo* to lay her course down the middle of the river.

If either vessel neglected her duty in respect of choosing a proper course, her fault, in that respect, was the foundation fault of this collision.

There can be no question that it was the duty of the *Albert Dumois* to lay her course up the east shore.

The answer filed by the *Argo* not only asserts that the *Albert Dumois* was "on or near said eastern shore" (*Record, p.* 38), but also that she was at that time "in the "usual and proper course for ascending vessels at the "place, and under the wind and the conditions then pre-"vailing" (*Record, pp.* 37, 38). The proofs recognize this custom (*Lombard, p.* 244).

The *Albert Dumois*, in accordance with such custom, was in fact proceeding up the east bank. The fact is not only asserted in the pleadings, but is established by the proofs as indicated by the following references to her location:

"On the left bank of said river coming up stream" (*Record, Argo's original Libel, p.* 1).

"Ascending said river on the left bank thereof" (*Mrs. Blesine's Libel, p.* 13).

"Coming up the river close to the east bank" (*Jakobsen's Answer, p.* 22).

"Proceeding up the river as close to the east bank as it "was safe for her to do" (*Jakobsen's Petition, p.* 26).

"Ascending said river on the left bank thereof" (*Mrs. Hester's Petition, p.* 30).

"Ascending said river on the left bank thereof" (*Mrs. Hester's Answer, p.* 34).

"Coming up the river near but about 450 or 500 feet "from the east bank thereof" (*Argo's Answer, p.* 37).

"On or near said eastern shore" (*Argo's Answer, p.* 38).

"Coming up on the east shore" (*Brown, p.* 49).

"I saw the steamer coming up in the river, on the east "side of the Mississippi River" (*Jurisch, p.* 91).

"Coming up hugging the shore" (*Dedes, p.* 149).

"Right on the east shore" (*Theodore, p.* 230).

"About a ship's length from the east bank" (*Lombard, p.* 241).

"A couple of ships's lengths from the bank" (*Sibitsen, p.* 265).

"The bank on the starboard side was about half a ship's "length away" (*Larsen, p.* 297).

It was the duty of the *Argo* as a descending vessel to be in the middle of the river. Her own pleadings recognize this obligation; thus:

> "The said *Argo* was coming down the Mississippi "River at the point stated, in the middle of the "stream and in her proper place" (*Argo's Answer, p.* 37).
>
> "She was in the middle of the river, in her proper "course" (*Argo's Answer, p.* 39).

The undisputed proofs are to the same effect:

> "On which side of the river is it customary and "usual for descending vessels to take? A. They "take the middle of the river" (*Lombard, p.* 244).

The master of the *Argo* and her deckhand assert that in fact she was in the middle of the river (*Brown, p.* 48; *Deseamus, p.* 79).

Another of the libellant's witnesses locates her "about "in the middle of the river a little more to the east side" (*Jurisch, p.* 92).

These scanty proofs are all that are put forward in support of the *Argo's* contention that she was holding her course down the middle of the river.

But that she was not in the middle of the river is established not only by direct proofs that she was on the east shore when first seen by the *Albert Dumois*, but also by the fact that with all her porting and her high speed, she scarcely reached the middle of the river at the time of the collision.

First, as to the direct proofs.

The pilot of the *Albert Dumois* testifies that the *Argo* was "head and head" with his vessel, if anything a little more to the eastward (*Lombard, pp.* 241, 242).

The second officer confirms this (*Sibitsen, p.* 259).

Such relative positions of the two vessels necessitated that the *Argo* should be fully as close to the eastern shore as the *Albert Dumois*.

Important confirmation of these proofs is found in the testimony of Green, one of the crew of the *Argo*, who says that being in the galley he heard the first whistle of the *Argo;* that he looked out and saw *all three lights* of the *Dumois* (*Green, pp.* 102, 104).

The master of the *Day Dream*, a tug which was lying fast to the bank, testifies that the *Argo* passed down the east bank, within one hundred feet of him, so that he could see the color of the boat (*Theodore, pp.* 225, 226), although the night was very dark (*Brown, p.* 52; *Lindauer, p.* 158; *Sibitsen, p.* 274).

By indirect proofs it is shown just as clearly that the *Argo* must have originally been on the east side of the river for her own proofs show that she had scarcely reached the centre of the river at the time of the collision.

Orkney, her chief engineer, in speaking of her position after the collision, says:

> "We were midway between the two shores and "I proposed that we pull ashore. We did not "know which shore to go to *because one was as far* "*off as the other*" (*Orkney, p.* 70).

Her fireman says:

> "I could see the bank of the river before we left "the *Argo*. As soon as my eyes got rid of the "glare of the fire-room I could see the bank."
> "Q. In what part of the river was the *Argo* then? "A. About the centre" (*Broadhurst, p.* 89).
> "We were in the centre when I could get my "sight; I couldn't see when I first came up" (*Broadhurst, p.* 90).

The master of the *Admiral Takeitoff* says that when the vessels struck they were "about in the middle of the "river, a little more to the east side" (*Jurisch, p.* 92).

A man from the *Day Dream* locates the collision as follows, on rather a leading examination:

> "Q. A little to the westward of the middle of "the river? A. Something like that; in the middle "of the river, or a little more to that side" (*Dedes, p.* 151).

Indeed, the master of the *Argo* claims no more than that at the time of the collision they were "a little to the "westward of the middle" (*Brown, p.* 50).

Yet before the collision the *Argo* had been running under a hard-a-port helm (*Brown, p.* 49) at a speed of "pretty near twenty miles an hour" (*Brown, p.* 50) and for at least a quarter of mile.

She must have started from close to the east shore in order to reach the place of collision under such movements.

In thus trespassing upon the waters of the *Albert Dumois* along the east shore, she was guilty of a foundation fault.

The Victory and Plymothian, 168 U. S. 410, 426.

There is a natural effort on the part of the *Argo* in spite of all proofs which come from her deck, to show that the collision occurred close to the western bank, thus leaving room for her to argue that her original position was in the middle of the river.

She is obliged to base her contention, however, solely upon the testimony of Norbert Buras. He states that in dragging the river in the following March he drew up a door and a piece of rope from a point "four arpents" below the canal and "about five hundred feet more or "less" from the west bank (*Buras, pp.* 110, 111). The bits of wreckage have been in a measure identified, and do not seem to differ in character from those which drifted ashore two or three miles below the scene of the collision on the west bank (*Brown, p.* 54).

Assuming that Buras did in fact fish up these pieces of wreck, and, moreover, that they were originally parts of the *Argo*, the proofs are insufficient to disturb the conclusion that the place of the collision was in the middle of the river. His alleged discovery was made some six weeks after the collision. He gave his testimony May 21st. He appears to have gone deliberately at work to drag for the wreck. Having located it he took no measures to determine with accuracy its distance from the shore. If he imagined that the location of the wreck on the west shore was of importance to the owners of the *Argo*, his failure to take accurate measurements can be explained only upon the theory that he was satisfied that such measurements would not be as serviceable as loose, general estimates. If he did not have in mind that the location of the wreck was of importance, his estimates, made weeks after the event, are quite valueless.

Moreover, as has been shown in our principal brief (*p.* 24), the exact location of the wreck would afford only a slight clew to the place of the collision, inasmuch as the

Argo was kept at full speed, headed for the western bank, from the time of the collision and ran some indefinite distance before she sank.

Fourth.

The counsel for the *Argo* exhibits justifiable anxiety to eliminate the rules of the Supervising Inspectors from the case and to throw over the collision only the more general provisions of § 4233.

While the Pilot Rules for Atlantic and Pacific Coast Inland Waters provide, as do the statutes, that when vessels are approaching each other "head and head," or nearly so, it shall be the duty of each steamer to pass to the right or port side of the other, they incorporate as a note, under Rule VIII., the statutory provision that "due regard must "be had to all dangers of navigation, and to any special "circumstances which may exist rendering a departure "from the rules necessary to avoid immediate danger."

Edition of 1896, *p.* 75.

Under this provision the *Albert Dumois* will find justification for starboarding her wheel, instead of porting.

The point will be considered later.

Just now we have to do with the faults of the *Argo* and, in addition to her first fault in proceeding down the east bank, she was in fault—

A. In giving a cross-signal;

B. In porting after the *Alfred Dumois* had given a signal of two blasts;

C. In not stopping and reversing when the cross-signal arose;

D. In not having a lookout.

A. The *Argo* blew a cross-signal in violation of the rules.

The Pilot Rules provide:

> " Rule III: If, when steamers are approaching " each other, the pilot of either vessel fails to under- " stand the course or intention of the other, whether " from signals being given or answered erroneously, " or from other causes, the pilot so in doubt shall " immediately signify the same by giving several " short and rapid blasts of the steam whistle; and if " the vessels shall have approached within half a " mile of each other, both shall be immediately " slowed to a speed barely sufficient for steerage- " way until the proper signals are given, answered, " and understood, or until the vessels shall have " passed each other" (*Edition of* 1896, *p.* 73).

The *Albert Dumois*, upon discovering the lights of the *Argo* hovering outside the cluster of lights belonging to the *Day Dream* and the luggers, blew a signal of two blasts.

This signal is admitted (*Argo's Answer*, *Art.* 3, *p.* 38).

It is further admitted that after that signal the *Argo* blew one blast (*Argo's Answer*, *Art.* 3, *p.* 38).

These two signals, taken together, constitute a cross-signal and, as we contend, constitute the *original* cross-signal in this case.

The *Argo*, on her part, seeks to avoid responsibility for the cross-signal by contending that she had given a signal of one blast still earlier, just before the signal of two blasts from the *Albert Dumois*.

Such earlier blast, if it was blown at all, was not blown for the *Albert Dumois*.

The pilot and the mate of the *Albert Dumois*, who were on her bridge, testify explicitly that no whistles came from the *Argo* prior to the signal given by the *Albert Dumois* (*Lombard*, *p.* 241; *Sibitsen*, *p.* 259).

In considering the *Argo's* proofs upon this subject, it is necessary to determine at the outset how many whistles she blew in all.

Now, nobody, except possibly the master of the *Argo*, claims to have heard the *Argo* blow more than two signals from first to last.

One of these signals, the first of them, was blown to

the *Day Dream* (*Brown, p.* 49; *Deseamus, p.* 80; *Jurisch, p.* 91; *Dedes, p.* 148; *Theodore, p.* 225), and did not concern the *Albert Dumois.* The second one was not blown until after the *Albert Dumois* had given her signal of two blasts. But the plain effort is being made to make the signal which the *Argo* blew to the *Day Dream* do duty as an initial signal to the *Albert Dumois.*

Aside from the rather ingenious testimony of the master of the *Argo*, there is no support whatever for such contention.

Deseamus, the deckhand of the *Argo*, apparently heard only two signals of one blast from the *Argo*, and one of these was admittedly for the *Day Dream* (*Deseamus, pp.* 83, 84).

Broadhurst, the fireman of the *Argo*, testified:

> " Between twelve and one o'clock I heard the " captain signal to pass a boat; he blew a signal " blast of the whistle, and shortly after he blew " that one, he blew another; one blast, and shortly " after that the shock came; that is all I know of " it; that is all I can tell " (*Broadhurst, p.* 87).

This witness, being in the fire-room, never knew to what vessel any particular signal was directed; but his testimony is important in showing that only two whistles were blown.

Orkney, the engineer of the *Argo*, heard her blow only two whistles. Upon hearing the first he looked out and saw the *Day Dream's* tow (*Orkney, p.* 68). Later he heard the second single blast from the *Argo*, and after that heard the *Albert Dumois* (*Orkney*, p. 68). Inasmuch as he has testified to only one signal of two blasts from the *Albert Dumois*, whereas there were admittedly two, it is apparent that her first signal escaped his notice, a signal which was blown just prior to the *Argo's* second signal.

Green, the cook of the *Albert Dumois*, likewise heard only two signals from the *Argo* (*Green, pp.* 96, 103). He testified:

> " Q. Then the *Argo* only blew two signals? A. " That is all that was blown aboard of the *Argo*; " all that I heard; two signals for passing.

"Q. Did the *Argo* blow any signals for the *Day* "*Dream?* A. I didn't hear any.

* * * * * *

"Q. I am just asking—you are certain that you "only heard the blast of the *Argo's* whistle twice? "A. Between the *Dumois* and the *Argo?*

"Q. Yes? A. Yes, sir; that is all that was blown "on her.

"Q. *Did you hear any before that?* A. Yes, sir; "because we just had met a vessel a little before "that.

"Q. How long before that? A. About ten min- "utes; maybe *fifteen or twenty minutes;* some- "thing like that.

"Q. What was the vessel that you met then? "A. We met a vessel bound up, but I don't know "what boat it was" (*Green, pp.* 102, 103).

It is to be observed that this witness erroneously believed that both signals which preceded the collision were intended for the *Albert Dumois.* This was a matter outside of his province. The important feature of his testimony is that he heard only two signals from the *Argo* during the last few minutes preceding the collision.

Jurisch, the captain of the *Admiral Takeitoff*, summoned by the *Argo*, heard only two whistles from her. His vessel was lying alongside the *Day Dream*, and the witness supposed that one of those two whistles was intended for the *Day Dream*, as, in fact, it was (*Jurisch, p.* 91).

Eliminating the *Argo's* first blast from the case, as not being connected in any way with the *Albert Dumois*, it is clear that the cross-signal, which has occasioned so much trouble, was given by the *Argo.*

It is quite probable that the master of the *Argo* gave the cross-signal under the erroneous belief that he was subject to the regulations prescribed by the Supervising Inspectors for Western Rivers.

Under examination by his counsel, he testified:

"Q. You understand, of course, which vessel "should blow first?

"A. It was her (*Dumois*) place to blow first; that "is what I was waiting for" (*Brown, p.* 53).

And under cross-examination:

> "Q. You understand the rule to be, then, that "when an ascending vessel gives the signal for "sides, that the descending vessel may give her "signal for sides?
>
> "A. Yes, sir. I was waiting for him to do it, "and I thought I would have to do it; couldn't "wait any longer, &c." (*Brown, p.* 57).

Such a practice would be somewhat in accord with the Pilot Rules for Western Rivers (*Rule I., Edition of* 1896, *p.* 82); but the master's ignorance of the proper rules cannot relieve the *Argo*.

Moreover, even under the rules for Western Rivers, the *Argo* would have been bound to immediately blow danger signals and to stop and back (*Rules I. II., Edition of* 1896, *p.* 82).

B. Whatever the duties of the vessels might have been in respect of porting, if they had been in open waters, and if there had been *no* signals, the *Argo* was grossly in fault for porting as and when she did.

She did not port at the time she gave her alleged first signal of one blast (*Argo's Ans., Art.* 3, *p.* 38; *Brown, p.* 49). But, *after* the *Albert Dumois* had blown a signal of two blasts, and *after* the master of the *Argo* had observed that the *Albert Dumois* had starboarded in accordance with such signal, the helm of the *Argo* was put harda-port.

The answer of the *Argo* specifically sets forth that the *Albert Dumois* gave a signal of two blasts, "and com-"menced crossing the stream," and "shut out her red light "and showed her green light," and that "thereupon," the *Argo* replied with one blast and "put her helm harda-"port" (*Answer, Art.* 3, *p.* 38).

The master of the *Argo* testified to the same sequence of events. He said: "I could see he had starboarded his "helm" (*Brown, p.* 49). Yet he ported and persisted in porting, and at the same time maintained his speed, apparently imbued with the conviction that rules and regulations were not made for him, and that, with his

swift and nimble craft, he could follow his own inclinations without danger. He testified:

> "Q. By the one blast of your whistle and the "porting of your helm what was the purpose of "that; to which way did you want to go?
> "A. I wanted to go to the westward on the other "side, out of his way. I was quartering. *By the "velocity I was going I made sure I could have "passed him;* we were going pretty near twenty "miles an hour" (*Brown, p.* 50).

And, again:

> "I put my wheel hard aport, and the velocity I "was going I made sure I would go clear of him" (*Brown, p.* 58).

So he persisted in trying to cross ahead of the *Albert Dumois*, trusting to his port helm and his high speed.

The fact that the *Albert Dumois* had already effectively starboarded before the *Argo* ported is demonstrated also by the very circumstance of the collision. When the respective rates of speed of the two vessels are considered—that of the *Argo* nearly twenty miles an hour and that of the *Albert Dumois* only nine miles an hour, it is apparent that the *Albert Dumois* must, at the time the *Argo* ported, have already gained a position in the river decidedly to the *westward* of the *Argo*. Otherwise the *Argo* would have outstripped her in the race to the westward, and the collision could not have occurred.

The argument of counsel (*Brief. p.* 28) that the speed of the *Albert Dumois* was "nearly doubled" by the adverse winds and the opposing current against which she was struggling, is novel, but does not seem to require serious attention.

C. The *Argo* expressly violated Rule III. of the Supervising Inspectors, in not stopping and reversing (*supra, p.* 11), and at the same time violated Rule 21 of § 4233, which is:

> "Rule 21: Every steam vessel, when approaching "another vessel so as to involve risk of collision, "shall slacken her speed, or, if necessary, stop and "reverse."
>
> *U. S. Revised Statutes, Section* 4233.

The recklessness of the *Argo* in respect of her speed has been fully commented upon in our principal brief (*pp.* 10, 11, 12, 33, 35), and was the subject of specific remark on the part of the Circuit Court of Appeals (*Record, pp.* 336, 337). It does not seem probable that the plea that her construction was such that she could not stop and reverse in the manner of ordinary workaday craft, can be deemed good in law. Certainly if she was disqualified by her construction from performing her obligations to other vessels, she should have been scrupulously cautious about trespassing in their waters.

The master of the *Argo*, in attempting to justify the maintenance of his speed, testified:

> "Q. Why didn't you stop after you blew the "second whistle? A. Because my judgment said I "could clear her, with the velocity I was going" (*Brown*, 58).

He had no right at that time to exercise his fallible judgment in direct disobedience of the mandates of the Inspectors rules and the statutes, and he has no right now to speculate that even though he had slowed, and stopped and reversed, the collision might have happened nevertheless.

He violated a statute when he maintained his speed unchecked, and the burden rests upon him of proving conclusively that his fault *could not* have contributed to the collision.

> *The Pennsylvania*, 19 Wallace, 126, 136.
> *Richelieu Nav. Co.* vs. *Boston Ins. Co.*, 136 U. S., 408, 422.

But if the *Argo* had reduced her speed and still had collided with the *Albert Dumois*, it is not speculation to say that no such disastrous results would have ensued as we are now forced to contemplate, in the way of the total destruction of the boat and the loss of two lives.

D. The *Argo* was not only in fault in not carrying a lookout, but that fault apparently contributed directly to the collision.

She was confessedly short-manned, lacking two of her crew (*Brown, p.* 55). To effect a technical compliance

with the terms of the *Argo's* certificate (*Record, p.* 175) the master induced two of his passengers to call themselves deckhands (*Brown, pp.* 55, 56, 65; *Lindauer, pp.* 169, 170), and then the two men thus impressed into technical service went to bed (*Green, p.* 98).

Being thus short-manned, the *Argo* was navigated practically without any lookout. Her master stood at her wheel, abaft the pilot-house (*Brown, p.* 57).

Deseamus, the deckhand, appears to have been near him. But Deseamus was no lookout. His duties are thus defined by the master:

> "Q. Deseamus was standing alongside of you?
> " A. Yes, sir.
> "Q. How long had he been there? A. Off and
> " on since we left; *I kept him there in case I wanted*
> " *to send him anywhere;* he was lookout, too"
> (*Brown, p.* 57).

Deseamus, himself, shows how easy the discipline of the *Argo* was in respect of lookouts by his testimony:

> "Q. How long had you been on deck with Cap-
> " tain Brown that night? A. On the bridge, or
> " around the deck?
> "Q. Around the pilot-house? A. Off and on all
> " night.
> "Q. You didn't stay there all the time? A. I
> " didn't stay by the captain all the time; no, sir; I
> " would go down in the engine and warm myself;
> " then I would come up on deck and look around
> " and see if my lights were burning brightly,
> " and then I would go down and warm myself
> " again.
> "Q. You were standing alongside of Captain
> " Brown at the time you first discovered the light
> " of the *Dumois?* A. Yes, sir.
> "Q. What were you doing there? A. I was
> " standing there talking to him and keeping a
> " look-out.
> "Q. How long had you been standing there?
> " A. About half an hour; I was just thinking
> " about going down and warming myself then,
> " just before the collision" (*Deseamus, pp.* 84, 85).

Such management explains why the initial signal of two blasts blown by the *Albert Dumois* may not have been heard by the *Argo*, if, in fact, it was not heard.

The New York and The Conemaugh, decided Nov. 20, 1899.

Fifth.

The *Albert Dumois* was without fault.

We appreciate the technical rule which is sometimes invoked in this Court, that when both Courts below have determined that a stated fact has been established, this Court will not question their judgment.

Such rule, however, is not applicable to the present case.

It is true, indeed, that the District Court found the *Albert Dumois* in fault; but the learned Judge has not put in the record any statement of his reasons therefor. We do not know what facts he deemed existed, and, in view of the facts as we know them, we have the right to assume that his error was one purely of law.

The Circuit Court of Appeals felt constrained to find the *Albert Dumois* partly in fault, but we submit that their conclusion also was an error of law. They say:

> "The fault of the *Dumois* is not so apparent. "She was properly officered, manned and equipped; "had a regular licensed pilot on board, carried the "regulation lights, and was in a place where she "had a right to be at the time the *Argo* was "sighted" (*Opinion, p.* 337).

Thus situated, and being bound up the river, the *Albert Dumois* saw ahead of her and close on the eastern shore of the river a cluster of lights belonging to the *Day Dream* and her tow of luggers. This tow had gone up the river an hour or so before, and had been made fast on the east bank of the Mississippi, just below the mouth of the New Canal.

The stiff wind blowing off the east shore sent one of the luggers, the *Admiral Takeitoff*, adrift. The *Day Dream* had been in search of her, and was "about making a land-"ing when the *Argo* blew one whistle" (*Dedes*, *p.* 148). Just above her lay four or five luggers (*Theodore*, *p.* 226).

This cluster of lights, hovering along the eastern shore extended from fifty to a hundred feet into the river. Just outside of them, not more than a hundred feet away, were the lights of the *Argo* (*Theodore*, *pp.* 225, 226).

The lights of the *Argo*, white, green and red, were all *on the same level*, about twelve feet above the water (*Brown*, 59).

These lights, low as they were, and not being the lights required by law (*U. S. Revised Statutes*, § 4233, *Rules* 3, 5, 6, 7) were not readily dissociated from those carried by the *Day Dream* and her flotilla. Moreover the pilot of the *Albert Dumois* was naturally slow to believe that a vessel was coming down the river on the eastern shore, in waters in which no descending steamer had any right to be.

Thus special circumstances existed, such as are contemplated by the Statutes and the Supervising Inspectors' rules and by the decisions of this Court, which justified the *Albert Dumois* in starboarding insteading of porting.

U. S. Revised Statutes, § 4233, *Rule* 24.

These are the circumstances:

The *Argo* was a light draft vessel, drawing only six feet (*Brown*, *p.* 62), and had already reached, if she had not passed, the *Day Dream* and her tow.

The *Albert Dumois* was a deep draft, sea-going steamer. She was already scarcely two hundred feet from the shore, "hugging the shore" (*Lombard*, *p.* 241; *Dedes*, *p.* 149). She had selected this place, according to custom, and with the justifiable expectation that she would not meet descending vessels in her waters.

The *Argo's* own witness, Conrad, testifies that it was scarcely safe for a vessel of her size to go closer than a hundred yards to the shore:

> "Q. How near would it be safe for a vessel to "go in there; a vessel like the *Albert Dumois?* A.

"I wouldn't run within—very close—one hundred "yards of it." (*Conrad, p.* 169.)

If the *Albert Dumois* had ported for the *Argo*, a vessel that had no right to be in her way, she would have been compelled to run into possible danger on the shore; and, moreover, would scarcely have been able to regain a position in the river outside of the *Day Dream* and the luggers by the time she reached them.

The *Argo*, with her light draft, and being already clear of the *Day Dream* and luggers, might readily seek waters nearer shore.

The *Albert Dumois* was even prepared to let the *Argo* hold her course, for when the *Albert Dumois* gave her signal of two blasts she *at the same time* starboarded her wheel (*Lombard*, pp. 241, 242).

The fact that the *Albert Dumois* had *actually* starboarded was noted by the master of the *Argo*, who saw her red light disappear and her green light come into sight under the influence of starboarding, just after her first signal of two blasts was blown, and before her second signal was heard (*Brown, pp.* 49, 50). The fact that the *Albert Dumois* thus promptly starboarded is indeed pleaded by the *Argo* in her answer (*Ans., Art.* 3, *p.* 38).

Nevertheless, the *Argo* then, after hearing the *Albert Dumois'* signal, and *after seeing* that she was starboarding, blew a signal of one blast, ported, and hard aported (*Brown*, p. 49; *Ans. Art.* 3, p. 38).

As soon as this signal of one blast came from the *Argo*, and it was the first signal that the *Albert Dumois* heard, and was, moreover, we submit, the first signal that was blown to her, the pilot of the *Albert Dumois* promptly repeated his signal of two blasts, following it instantly with a danger signal, and at the same time stopped and reversed his engines.

Her pilot testifies:

"You answered the *Argo's* whistle immediately? "A. Yes, sir, with two and the danger signal."

"Q. What interval was there between that and "the backing of the *Dumois?* A. Just about two "seconds; at the time I blew my whistles I rang

" the telegraph to back, stop and back full speed " astern " (*Lombard, p.* 243).

The mate testifies:

" A. We blew the danger signals right at once as " we blew the two whistles; we blew the danger on " top of it.

" Q. When were the engines stopped and re- " versed? A. As soon as the danger signal was " blown.

" Q. Was the order obeyed? A. The order was " obeyed " (*Sibitsen, pp.* 271, 272).

The wheelsman testifies:

" Q. Do you know when the pilot telegraphed to " reverse the engines? A. Yes, sir.

" Q. When was that? A. It was right there; " when he blew the danger signal he went from the " whistle string to the telegraph.

" Q. Were the engines of the steamship reversed " or not in response to this telegraph? A. Yes, sir; " on our vessel it was stopped " (*Larsen, p.* 297).

This testimony is further confirmed by the master (*Rustad, p.* 211).

The Circuit Court of Appeals have not found *facts* which justify its judgment that the *Albert Dumois* was partly in fault for this collision. They base their conclusion, apparently with reluctance, upon the supposed application of Rule 19 of § 4233, which provides:

" If two vessels under steam are crossing so as " to involve risk of collision, the vessel which " has the other on her starboard side shall keep out " of the way of the other,"

U. S. Revised Statutes, § 4233, *Rule* 19

and upon the so-called " fifth situation " of the Supervising Inspectors (*Opinion, pp.* 337, 338).

They have recognized that the *Albert Dumois* was justified by circumstances in starboarding for the *Argo* originally, instead of porting.

We submit, however, that the Court fell into legal error in supposing that either Rule 19 of § 4233 or the "fifth situation" of the Supervising Inspectors was applicable to the *Albert Dumois*, when she found herself, *as the result of such manœuvre*, temporarily in the indicated situation, and applicable with such effect as to impose upon her either the general obligation of everlastingly keeping out of the way of the *Argo*, or the specific obligation of porting her helm.

It is not as though, upon coming within range of each other's lights, the *Albert Dumois* had found herself, unhampered by special circumstances, carrying the *Argo* on her starboard bow, or, what amounts to the same thing, had found herself in the position defined by the Supervising Inspectors as the fifth position.

The situation was one of emergency. It was not an original situation; it was one created by manœuvres properly adopted for passing the *Argo*.

A situation similar to the "fifth situation" had been created by the starboarding of the *Albert Dumois*, and properly created. It would nullify the manœuvre, and lead to unmeasurable complications to hold that she must, pursuant to the regulations governing the "fifth situation," port her helm, undo everything that she had done, turn again to the east bank, and run away from the safety which she had acquired.

The *Albert Dumois* performed the full measure of her duty under the statutes and under the Supervising Inspectors regulations when she effectively starboarded, and made such starboarding known to the *Albert Dumois*.

Her manœuvres were frustrated by the porting of the *Argo*, a porting which occurred *after* the *Argo* knew that the *Albert Dumois* had starboarded (*Argo's Ans. Art.* 3, *p.* 38), and at a time when the *Argo* was therefore bound to starboard, or, at the least, to hold her course.

The same statute which required the *Albert Dumois* to keep out of theway, obligated the *Argo* to hold her course.

U, S. Revised Statutes, § 4233, *Rule* 23.

But the *Argo* deliberately ported.

For this second situation of peril, thus created by the porting of the *Argo*, the *Albert Dumois* was specifically directed, both by statutes and by rules, to seek safety in *stopping and reversing*, and stop and reverse she did, with all promptness.

U. S. Revised Statutes, § 4233, *Rule* 21.
Inspectors Rules, Rule III., Edition of 1896, *p.* 73.

She could do nothing more. It is well known that upon reversing the screw of a steamer her helm becomes practically powerless. It may operate naturally or just the reverse, or may not operate at all. Much depends upon the state of her loading, the direction of the wind and current, or the build of the steamer. In any event its influence is slight.

White's Manual of Naval Architecture.
Marsden's Collisions at Sea, 4th Ed., p. 504.
Luce's Seamanship, p. 546.

When one vessel is found grossly in fault, the Court will not examine critically to see whether the other has exercised the highest degree of skill in her management.

The Elizabeth Jones, 112 *U. S.*, 514, 526,
The Maggie J. Smith, 123 *U. S.*, 349, 355.

Or, as stated in a recent case:

> " As between the vessels, the fault of the *Victory* " being obvious and inexcusable, the evidence to " establish fault on the part of the *Plymothian* " must be clear and convincing in order to make a " case for apportionment."
>
> *The Victory and the Plymothian*, 168 *U. S.*, 410, 423.

The *Albert Dumois* was prompt to recognize the first fault of the *Argo*, that of proceeding down the east shore, and made her best efforts to meet the emergencies which it created by starboarding her helm, and by signalling accordingly.

She was again prompt to recognize the next fault of the *Argo*, that of porting, by stopping and reversing her engines as required by law, and by signalling accordingly.

She was powerless to do anything more whan the *Argo* committed the further fault of maintaining her high speed.

Whether, in the light of present knowledge, it now appears that the *Albert Dumois* could have done more, is not the question. The question is whether, "in the exercise "of due care and caution in the management of the "vessel," her navigators were at the time bound to do more.

The Victory and Plymothian, 168 *U. S.*, 410, 424.

Sixth.

The question of the value of the *Argo*, if that is a material point, has been fully argued in our principal brief.

The disallowance of interest by the Circuit Court of Appeals was within their right under Rule XXX., the fourth section of which provides:

> "In cases of admiralty damages and interest "may be allowed, *if specially directed* by the "Court."

The disallowance of interest is an indication by the Circuit Court of Appeals even beyond the language of their decision, of their views as to the relative faults of the two vessels.

Seventh.

Assuming for the sake of argument that both vessels were in fault for the collision, the *Argo's* third assignment of error (*Brief, pp. o and p*), as well as the argument

put forward in support of same (*Brief, pp. r to* 7), is unsound. It is to the effect that by surrendering the wrecked hull of the *Argo* and her charter hire (*Record, p.* 43), her owner discharged himself from all further liability to persons sustaining losses through the collision.

He asserts, therefore, a right, under a decree of mutual fault, to recover from the *Albert Dumois* a full, clean one-half of the value of the *Argo* undiminished by any contributions to Mrs. Hester and Mrs. Blesine. His surrender of the wreck and hire effects no such result. In order to secure the benefit of limitation of liability he would be bound to surrender, not merely the physical wreck, but also all his "rights of action which were "directly representative of the ship and freight."

O'Brien vs. *Miller*, 168 U. S., 287-303.

By the rules of law recognized in that case, any possible recovery of the owner of the *Argo* against the *Albert Dumois* under a decree of mutual fault is chargeable with one-half of the damages awarded to Mrs. Hester and Mrs. Blesine.

In a supplemental brief filed on the part of the *Argo* it is urged that no lien or privilege exists upon an offending vessel in support of the right of action given by the Louisiana Code in respect of injuries resulting in death.

We believe the contention is not sound. The Civil Code of Louisiana, as amended by Act No. 71 of 1884, is as follows:

> "Article 2315.--Every act whatever of man that "causes damage to another, obliges him by whose "fault it happened to repair it; the right of this "action shall survive, in case of death, in favor "of the minor children or widow of the deceased, or "either of them, and in default of these, in favor "of the surviving father and mother, or either of "them for the space of one year from the death. "The survivors above mentioned may also recover "the damages sustained by them by the death of "the parent, or child, or husband or wife, as the "case may be."

While this Article, standing by itself, does not necessarily contemplate anything more than an ordinary action according to the course of law as it is administered in Louisiana (*The Corsair*, 145 U. S., 335, 348), the Code elsewhere explicitly gives a lien upon an offending craft for a prescribed period:

> "Paragraph XII.--Where any loss or damage
> " has been caused to the person of property of any
> " individual by any carelessness, neglect or want of
> " skill in the direction or management of any steam-
> " boat, barge, flat boat, water craft or raft, the
> " party injured shall have a privilege to rank after
> " the privileges above specified. The term of the
> " prescription of privileges against ships, steam-
> " boats and other vessels shall be six months."
>
> *Civil Code, Article* 3237.

The owners of the *Albert Dumois* and of the *Argo* both instituted their respective proceedings for limitation of liability within the period of prescription, and therefore during the life of the liens. Thereafter the claims of Mrs. Blesine and Mrs. Hester, were maintainable only in such proceedings and were enforceable only against the security given therein.

> *United States Revised Statutes*, § 4285.
> *Admiralty Rules*, 54-58.
> *Norwich Co.* vs. *Wright*, 13 Wallace, 123.
> *Steamship Co.* vs. *Hill Mfg. Co.*, 109 U. S., 598.
> *Butler* vs. *Boston Steamboat Co.*, 130 U. S., 527.

The prescription of time through which the lien upon the *Corsair* (145 U. S., 335) was lost was therefore not operative.

It is immaterial, however, whether there was a lien accorded by the Louisiana statutes in respect of the claims of Mrs. Blesine and Mrs. Hester, and it is also immaterial whether either Mrs. Blesine or Mrs. Hester sought relief through allegations of such lien.

The claims filed by them respectively were proper claims to file in limited liability proceedings.

The Catskill, 95 Fed. Rep., 700.

If the *Albert Dumois* was partly in fault for the collision, then the decree against the bond given for that vessel in favor of Mrs. Blesine and Mrs. Hester respectively was correct. And, upon the assumption that both vessels were in fault, the decree was correct in offsetting against the allowance to the owner of the *Argo*, one-half of all damages sustained by the *Albert Dumois* physically or paid by her stipulators.

The North Star, 106 U. S., 17.

The Chattahoochee, 173 U. S., 540.

Eighth.

It is respectfully submitted that the decree of the Circuit Court of Appeals should be reversed and that a mandate should issue to the District Court of the United States, directing that Court to sustain the petition of the owners of the *Albert Dumois*, and to dismiss all claims against the vessel and her owner, with costs.

WILHELMUS MYNDERSE,
Advocate.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 139.

OSCAR M. SPRINGER, LIBELLANT, PETITIONER,

versus

ANDERS JAKOBSEN, CLAIMANT OF THE S. S. ALBERT DUMOIS.

No. 272.

ANDERS JAKOBSEN, CLAIMANT OF THE S. S. ALBERT DUMOIS,

versus

OSCAR M. SPRINGER ET ALS., RESPONDENTS.

Brief on Behalf of Mrs. Harrison P. Hester, Individually and as Tutrix.

STATEMENT.

The steam yacht Argo, belonging to Oscar M. Springer, was on the 27th day of January, 1897, chartered to the New Orleans *Picayune* newspaper to make a trip to the jetties at

the mouth of the Mississippi river and return. She started on her journey on the evening of the same day, at about 7 o'clock, having on board James Brown, captain and pilot; Robert Orkney engineer; Henry Deseames, deckhand; Isaac Broadhurst, fireman; Edwin C. Green, cook and steward; H. G. Hester, A. C. Lindauer, A. Faure, Bourgeois de Blesine and L. Frantz. Hester, Lindauer and Blesine were reporters of the *Picayune* and Frantz was a guest. Hester was in charge of the reporters.

According to her inspection certificate the Argo should have had one pilot, one engineer and five crew. To avoid delay Hester and Blesine agreed to lend a hand in place of two of the crew (p. 48).

The facts of the collision, the result of the trial in the District Court and the appeal and assignment of errors are all stated in the brief of Mr. DeGray for the Argo, and it is not necessary to repeat here.

The Dumois having taken the benefit of the limited liability act and a monition having been issued by the Court prohibiting suits against both vessel and owners, Mr. Hester came in in answer to the monition and filed an answer thereto, and also a petition, the two being in substantially the same language.

Judgment was rendered in favor of Mrs. Hester individually for $3000, and in her favor as tutrix of her minor child for $2000.

If, as we assume, Hester was a passenger on board of the Argo, it is a matter of indifference to us whether the Argo and Dumois are both at fault, or the Damois alone to blame for the collision, for it was practically conceded in the lower Court, and, indeed, perfectly clear from the evidence that the Dumois was blameworthy In the case of the Atlas, 93 U. S. 303, and the Juniata, 93 U. S. 338, it decided that when two vessels are to blame for a collision an innocent party can recover from either the whole of the damage. We can, therefore, recover the whole amount of damage from her whether she alone be to blame or the Argo be equally blameworthy.

We have, therefore, no great interest in fastening the whole fault upon the Dumois, but the evidence in the case is to our minds so clear that we would argue against our convictions if we attempted to hold the Argo responsible.

The rules governing the case are to be found in an act of Congress of 1895, the regulations established thereunder, and Sec. 4233 of the Revised Statutes.

Under these rules it was the duty of both the Argo and Dumois to have blown one whistle and passed each other on the port side. The Argo did all that the law required, and, therefore, is not to blame. If she complied with the law the Court should not hold that she did wrong, and for like reason the Dumois, not having complied with the law, the Court should hold that she did wrong.

There seems no answer to the proposition, and the only answer made appears to be that the Argo is also to blame, because she was, it is contended, close to the east bank, directly in the course of ascending vessels, and, moreover, did not port her helm as soon as she blew one whistle, thereby placing the Dumois in a condition of extreme peril.

This argument assumes that the Argo was close to the east bank, and not in the middle of the river, and is not supported by the evidence, which clearly establishes that the Argo was descending in the centre of the river, the usual and proper course for descending vessels; that the Argo blew first—one whistle; that the Dumois answered with two whistles and starboarded her helm; that the Argo immediately blew one whistle and ported her helm; that the Dumois replied with two whistles and immediately blew the alarm whistle; that the collision occurred immediately thereafter, and that the interval of time between the blowing of the first whistle and the collision was exceedingly short.

ARGUMENT.

Brown, master of the Argo (pp. 48-50); Deseames, her lookout (p. 79); Orkney, her engineer (p. 69), say the Argo was descending in the middle of the river. The evidence of these three of the Argo crew is contradicted by Lombard, the

pilot, and Sibitzen, the mate and officer of the Dumois, and by Theodore, master of the Day Dream, and Larsen, a seaman of the Dumois, while Dedes, pilot of the Day Dream (p. 151), which was lying at the east bank, and Jurisch, master of a lugger tied up on the river side of the Day Dream, fix the Argo (pp. 91-108) in the middle of the river, in the usual course of descending vessels.

Thus five witnesses, two of whom are disinterested, are opposed to four on behalf of the Dumois, only one of whom is disinterested. The testimony of this one (Theodore) is entitled to no weight, for he swears that the Argo passed so close he could see her white paint by his chimney light and thought she would run into him, and yet swears he did not see the lights of the Argo, and did not know which way she was going, whether up or down stream. He further agrees that the collision occurred in the centre of the river, and yet to eke out his statement of the proximity of the Argo says the collision took place within 200 feet of the Day Dream. Theodore also admits that he heard the Argo blow, but heard no signals from the Dumois, and refuses to state even approximately how wide the river is at any point; thinks it a mile wide at New Orleans, but won't swear it is not two, three or five miles wide. Jurisch, who was on the lugger lying on the outside of the Day Dream, and therefore close to the course of the Argo, says she was in the centre of the stream, and Dedes, Theodore's pilot, also places her in the centre of the stream, and neither expressed the slightest apprehension that the Argo would run them down.

In addition to a strong preponderance of testimony we have probabilities in favor of the Argo. She had been chartered by the *Picayune* to go down the river in pursuit of the Whitney, which had started some hours before, and was on a mission of haste, requiring the utmost speed. Every one knows that the proper course for the Argo to have taken under the circumstances was the centre of the river, where she would have the benefit of the current, and it is hardly reasonable to suppose that Brown, with forty years of experience, should have left the current and hugged the eastern shore. This

Court, in The City of New York, 147 U. S. 72, held that the probability that a vessel will pursue the usual course is a strong presumption, requiring a clear preponderance of testimony to overcome. Add to this that the collision occurred to the west of the centre of the river, and that the wreck of the Argo was located at a point 500 feet from the west bank (p. 110 et seq.), and it is settled that the Argo was in the centre of the river, in the usual and proper course, and that the Dumois is alone to blame for the collision and loss of two precious human lives.

But the case of the Dumois is so weak that if all of the testimony in the case be excluded, except the testimony of her own witnesses, she will still be found in fault.

It is conceded that she blew the wrong whistle, but it is contended that she could not do otherwise, because she was too close to the east bank to port her helm and go to the starboard, and was compelled to go to port by the action of the Argo in hugging the east bank and not promptly going to port as soon as she blew her first whistle, thereby placing the Dumois in extreme peril, necessiating some action on her part to endeavor to save herself.

Granted that the Argo was on the east side, Brown's signal of one whistle was correct, and according to law, and the duty of the Dumois under the same law was to port her helm and go to the starboard if she had room, and if she did not have room to blow one whistle and stop, and if necessary reverse. The blowing of two whistles and starboarding the helm was a clear violation of the law.

If the Dumois had obeyed the law no collision would have occurred, no lives been lost, for if the Argo almost succeeded in getting by the Dumois, which was chasing her across the river, she would certainly have safely passed by the Dumois if she had stopped or even held her course. The extreme peril was not brought about by the acts of the Argo, and, therefore, the rule of extreme peril has no application. Again, according to the Dumois, she blew the first whistle announcing her intended violation of the law, and Brown at once replied with one that he intended to obey the law.

Granted that the Argo did not port her helm when she blew the first signal, we have only a difference of opinion between her master and the Dumois as to whether she could hold her course and pass safely, whereas the Dumois anticipated and assumed that the Argo could not do that which the Dumois knew to be her duty and which she actually did do, viz.: blow one whistle and port her helm, for the Dumois claims to have blown first—two whistles and starboard her helm.

But if there was any evidence in this case authorizing the Dumois to invoke the doctrine of extreme peril, "the burden of proof lies on the party alleging that he was justified in such departure. Indeed, in the *Argo* it was ruled that not only must it be shown that the departure at the time it took place was necessary in order to avoid immediate danger, but also that the course adopted was reasonably calculated to avoid that danger. And it is the settled rule in this Court that when a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so." (*Belden vs. Chase*, 150 U. S. 674, 699.)

On her own testimony, the Dumois had ample room to port her helm and go starboarded. Three witnesses on the Dumois swear to her distance from the bank when the Argo appeared. Lombard, the pilot, says she was about one ship's length from the bank (p. 241). (A ship's length is 210 feet, says Lombard, p. 239). Larsen (p. 297), the man at the wheel at the time of the collision, says about half a ship's length, while Sibitzen, the mate and officer on watch and in command of the Dumois, places her at a distance of a couple of ship's lengths (p. 265), or about 500 feet (p. 275), far enough out to pass the luggers without swinging out into the stream (pp. 273, 274). He says that if the Dumois had kept her course up the river, there would have been about 450 feet of space between her and the luggers as she went up stream (p. 276), and that the Argo was further out from the bank than the luggers, nearer on a line with the Argo (p. 274). If Sibitzen be correct, the Dumois had plenty of room to go to starboard, as the charts in evidence show

deep water up to the bank, deep enough to float much larger vessels than the Dumois. If we add the three distances together and divide by three, the Dumois was 270 feet from the bank, and could have gone 200 feet closer. In the face of such evidence it is difficult to understand how it is possible to absolve the Dumois, unless we are to disregard Sibitzen and take the naked statement of Lombard, that he could not approach the bank more closely, and disregard also the chart, which shows deep water up to the very bank; and also Jurisch (p. 93), and Dedes (p. 152), who testify to deep water.

On the evidence of all parties, the collision would not have occurred had the Dumois simply done nothing but hold her course. She claims that she was close to the eastern bank, and admits that the collision occurred to her starboard, in the middle of the river. The statement is sufficient to show that she is in fault.

As said by Judge Woodruff in the Atlas case (10 Blatchford), the Dumois should have complied with the law, and then, if a collision had occurred, she at least would have been free from blame.

It would have been better and certainly done less harm if the Dumois had actually run into the bank.

Rules governing the movements of ships are made by competent persons, who adopt them carefully and considerately, while the observance of these rules is entrusted to all sorts of men. The only safety of travelers upon the water is to demand and enforce a rigid observance of the rules.

If anything further were needed to condemn the Dumois, she has furnished it. The testimony would have been incredible if it had not fallen from the mouths of her own witnesses. They testify that the steersman, or man at the wheel, was changed between her first and her second cross signal (Larsen, p. 297, Sibitsen, pp. 262, 263); that the lookout did not report the lights of the Argo (pp. 258, 259); that the lookout walked backward and forward from the bow, so that half of the time he could not see ahead (p. 267). As tending to further show the lack of discipline on the Du-

mois, the evidence is that though the crew of the Argo had time to get out a boat, get into it, row away from the Argo to the Dumois, the Dumois did not succeed in getting a boat off to the rescue of the Argo.

A circumstance which tells strongly against the Dumois is that her lookout, Peter Johnson, and the man who was at the wheel when the Argo was first sighted and the first signals given (pp. 299, 302) were not produced as witnesses for the Dumois (p. 29).

The Dumois was libeled on the day of the collision and the testimony of Wessel and Johnson could have been taken, and it must be presumed would have been taken if favorable.

Hester was a bright and promising young man. All of the witnesses say he was a born journalist, able in time to rise to the head of his chosen profession, having shown marked ability and industry. He was earning $17.50 a week, was shortly to be raised to $20, then $25 per week, and his widow and child were solely dependent upon his labor, having no means of their own. By the fault of the Dumois they are deprived of support. The widow is not in robust health; the child a helpless infant, with a long life in prospect.

In a supplemental brief on behalf of the Argo, it is claimed that Mrs. Hester and Mrs. Blesine can not recover, because they have no claim against the offending vessel, having no lien under the local law.

This is a misapprehension. Act No. 71, of 1884, amending Art. 2315 of the Civil Code, reads:

"Every act whatever of man that causes damage to another, obliges him by whose fault it happened, to repair it. The right of this action shall survive in case of death in favor of the minor children or widow of the deceased, or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by the death of the parent or child or husband or wife, as the case may be."

And Art. 3237 of the Code, paragraph 12, reads:

"When any loss or damage has been caused to the person or property of any individual by any carelessness, neglect or

want of skill in the direction or management of any steamboat, barge, flat boat, water craft, or raft, the party injured shall have a privilege to rank after the privileges above specified. The term of the prescription of privileges against ships, steamboats, and other vessels shall be six months."

Proscription had not accrued when proceedings were instituted.

But the question ~~often~~ is immaterial, the monition issued "against all persons claiming damages, for any and all loss, damage or injury caused by, or resulting from the collision aforesaid, citing them to appear before this Honorable Court and answer said petition, and make due proof of their respective claims," and Mrs. Hester properly and rightly came in in answer to the citation and made her claims. It is idle to claim that one is forbidden to act by the order of the court and at the same time deprived of all remedy.

The point is expressly decided in our favor in The Catskill, 95 Federal Reporter, 700.

As justly said in the supplemental brief on behalf of the Dumois:

"If the *Albert Dumois* was partly in fault for the collision, then the decree against the bond given for that vessel in favor of Mrs. Blesine and Mrs. Hester, respectively, was correct, and upon the assumption that both vessels were in fault, the decree was correct in offsetting against the allowance to the owner of the Argo one-half of all the damages sustained by the *Albert Dumois* physically or paid by her stipulation.

The North Star, 106 U. S. 17.

The Chattahoochee, 173 U. S. 540.

It is respectfully submitted that the judgment of five thousand dollars in favor of Mrs. Hester and her minor child should be affirmed, with interest at the legal rate of 5 per centum per annum from the date of the decree of the District Court, viz., January 29, 1898, as provided in said decree.

GEORGE DENÈGRE,
J. P. BLAIR,
WALTER D. DENÈGRE,
Proctors for Mrs. Hester.